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Food and Nutrition Service

7 CFR Parts 210, 215, 220, et al.

National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010; Final Rule

**DEPARTMENT OF AGRICULTURE****Food and Nutrition Service****7 CFR Parts 210 and 220**

[FNS–2011–0019]

RIN 0584–AE09

**National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in Schools as Required by the Healthy, Hunger-Free Kids Act of 2010****AGENCY:** Food and Nutrition Service, USDA.**ACTION:** Final rule and interim final rule.

**SUMMARY:** This rule adopts as final, with some modifications, the National School Lunch Program and School Breakfast Program regulations set forth in the interim final rule published in the **Federal Register** on June 28, 2013. The requirements addressed in this rule conform to the provisions in the Healthy, Hunger-Free Kids Act of 2010 regarding nutrition standards for all foods sold in schools, other than food sold under the lunch and breakfast programs. Most provisions of this final rule were implemented on July 1, 2014, a full year subsequent to publication of the interim final rule. This was in compliance with section 208 of the Healthy, Hunger-Free Kids Act of 2010, which required that State and local educational agencies have at least one full school year from the date of publication of the interim final rule to implement the competitive food provisions.

Based on comments received on the interim final rule and implementation experience, this final rule makes a few modifications to the nutrition standards for all foods sold in schools implemented on July 1, 2014. In addition, this final rule codifies specific policy guidance issued after publication of the interim rule. Finally, this rule retains the provision related to the standard for total fat as interim and requests further comment on this single standard.

**DATES:** *Effective date:* This final rule is effective September 27, 2016.

*Comment date:* Comments on the interim final rule total fat standard must be submitted by September 27, 2016.

*Compliance dates:* Except as noted in this final rule, compliance with the nutrition standards and other provisions of the interim final rule began on July 1, 2014. The potable water provision was effective on October 1, 2010, and compliance with that provision was required no later than August 27, 2013.

**ADDRESSES:** To be considered, written comments must be submitted by one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>, select “Food and Nutrition Service” from the agency drop-down menu, and click “Submit”. In the Docket ID column of the search results select “FNS–2011–0019” to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period is available through the site’s “User Tips” link.

- *By Mail:* Send comments to Tina Namian, Branch Chief, School Meals Branch, Policy and Program Development Division, Child Nutrition Programs, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302. Mailed comments must be postmarked on or before the comment deadline identified in the **DATES** section of this preamble to be assured of consideration.

All submissions received in response to the interim final provision on total fat will be included in the record and will be available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting comments will be subject to public disclosure. FNS also will make the comments publicly available by posting a copy of all comments on <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Tina Namian, Branch Chief, School Meals Branch, Policy and Program Development Division, Child Nutrition Programs, Food and Nutrition Service, 3101 Park Center Drive, Alexandria, Virginia 22302, or by telephone at (703) 305–2590.

**SUPPLEMENTARY INFORMATION:****I. Overview**

This rule affirms, with some modifications, the interim final rule (IFR) that implemented amendments made by sections 203 and 208 of Public Law 111–296, the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), to the Child Nutrition Act of 1966 (CNA) and the Richard B. Russell National School Lunch Act (NSLA) for schools that participate in the School Breakfast Program (SBP) and the National School Lunch Program (NSLP). The final rule addresses public comments submitted in response to the IFR and makes some adjustments that improve clarity of the

provisions set forth in the IFR. In response to comments and implementation experience as shared by operators, the final rule also incorporates and codifies some policy guidance to allow additional foods and combinations to meet the nutrition standards. Specifically, the regulation finalizes the IFR, with the following changes:

*Modifies definitions as follows:*

- Adds the term “main dish” to the definition of “Entrée” for clarification;
- Adds the term “grain-only” breakfast entrées to the definition of “Entrée” to codify policy guidance issued during implementation; and
- Adds a definition of “Paired exempt foods” to codify policy guidance issued during implementation.

*Expands exemptions as follows:*

- Adds a specific exemption to the total fat and saturated fat standard for eggs; and
- Modifies the exemption to the General Standards for canned vegetables to exempt low sodium and no-salt added vegetables with no added fat to more closely align with USDA Foods standards and industry production standards.

*Retains as interim with a request for comment:*

- The nutrient standard for total fat.

*Makes a technical change as follows:*

- In § 210.11(i) and § 210.11(j), a revision is made to clarify that the calorie and sodium limits apply to all competitive food items available on school campus and not just to those sold a la carte during the meal service.

*Impact of the 2015–2020 Dietary Guidelines for Americans*

The original development of the standards contained in this regulation was informed by the 2010 Dietary Guidelines for Americans (DGA), which were published in December 2010. Based on a thorough review of the recently published 2015–2020 DGA, USDA has determined that the standards contained in this regulation are also consistent with the new DGA. Key recommendations from the 2010 DGA are maintained in the 2015–2020 DGA, and so continue to be in line with the standards included in this rule. The 2015–2020 DGA contain a specific additional recommendation on limiting added sugar. A discussion of this recommendation and its relationship to the standards included in this rule is contained in this preamble in the discussion of the standard for sugar.

**II. Background**

The NSLP served an average of 30.4 million children per day in Fiscal Year

(FY) 2014. In that same FY, the SBP served an average of 13.6 million children daily.

The NSLA (42 U.S.C. 1751 *et seq.*) and the CNA (42 U.S.C. 1771 *et seq.*) require the Secretary to establish nutrition standards for meals served under the NSLP and SBP, respectively. Prior to the enactment of the HHFKA, section 10 of the CNA limited the Secretary's authority to regulate competitive foods, *i.e.*, foods sold in competition with the school lunch and breakfast programs, to those foods sold in the food service area during meal periods. The Secretary did not have authority to establish regulatory requirements for food sold in other areas of the school campus or at other times in the school day.

The HHFKA, enacted December 13, 2010, directed the Secretary to promulgate regulations to establish science-based nutrition standards for foods sold in schools other than those foods provided under the NSLP and SBP. Section 208 of the HHFKA amended section 10 of the CNA (42 U.S.C. 1779) to require that such nutrition standards apply to all foods sold:

- Outside the school meal programs;
- On the school campus; and
- At any time during the school day.

Section 208 requires that such standards be consistent with the most recent DGA and that the Secretary consider authoritative scientific recommendations for nutrition standards; existing school nutrition standards, including voluntary standards for beverages and snack foods; current State and local standards; the practical application of the nutrition standards; and special exemptions for infrequent school-sponsored fundraisers.

In addition, the amendments made by section 203 of the HHFKA amended section 9(a) of the NSLA (42 U.S.C. 1758(a)) to require that schools participating in the NSLP make potable water available to children at no charge in the place where meals are served during the meal service. This is a nondiscretionary requirement of the HHFKA that became effective October 1, 2010, and was required to be implemented by August 27, 2013.

The Department published a proposed rule in the **Federal Register** on February 8, 2013 (78 FR 9530), titled *National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010*. This rule proposed nutrition standards for foods offered for sale to students outside of the NSLP and SBP,

including foods sold à la carte and in school stores and vending machines. The standards were designed to complement recent improvements in school meals, and to help promote diets that contribute to students' long term health and well-being. The proposed rule also would have required schools participating in the NSLP and afterschool snack service under NSLP to make water available to children at no charge during the lunch and afterschool snack service. USDA received a total of 247,871 public comments to the proposed rule during the 60-day comment period from February 8, 2013 through April 9, 2013. This total included several single comment letters with thousands of identical comments. Approximately 245,665 of these were form letters, nearly all of which were related to 104 different mass mail campaigns. The remaining comments—over 2,200—were unique comments rather than form letters. Comments represented a diversity of interests, including advocacy organizations, industry and trade associations, farm and other industry groups, schools, school boards and school nutrition and education associations, State departments of education, consumer groups and others. USDA appreciated the public interest in the proposed rule and carefully considered all comments in drafting the IFR.

As referenced earlier in this preamble, the Department published an IFR in the **Federal Register** on June 28, 2013, (78 FR 39068) titled *National School Lunch and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010*, and all provisions were required to be implemented on July 1, 2014, a full year subsequent to publication of the IFR standards. This was in compliance with section 208 of the HHFKA requirement that State and local educational agencies have at least one full school year from the date of publication of the IFR to implement the competitive food provisions.

### III. General Summary of Comments Received on the Interim Rule

A total of 520 public comments on the IFR were received during the 120-day comment period that ended on October 28, 2013. Fifty-three of these comments were copies of form letters related to nine different mass mail campaigns. The remaining comments included 460 letters with unique content rather than form letters. A total of 386 of these comments were substantive. Comments represented a diversity of interests, including advocacy organizations; health care organizations; industry and

trade associations; farm and industry groups; schools, school boards and school nutrition and education associations; State departments of education; consumer groups; and others. A relatively modest number of comments were received on the IFR, many of which reiterated previous comments received during the proposed rule comment period and which had been taken into consideration as the IFR was drafted. This final rule, therefore, incorporates relatively minor modifications to the provisions of the IFR.

In general, there was support for the IFR. Stakeholders were very supportive of the IFR, and some had specific comments and suggestions on several provisions included in the rule. Of the 520 comments, 103 were in full support of the rule. Fifty commenters objected to implementation of this rule, indicating that no standards for competitive food should be implemented in schools. The remaining commenters included suggested revisions to various aspects of the rule and its implementation.

Commenters recommended expanding exemptions to several of the standards for specific food items, such as side items served in the NSLP and the SBP, while others recommended continuing the initial sodium standard for snack foods. Several commenters recommended that the General Standard which allowed foods meeting the 10 percent Daily Value for nutrients of public health concern be made permanent rather than eliminated on July 1, 2016, as was included in the IFR. More detailed discussions of these specific issues are included in this preamble.

Twenty-five comments expressed general support for the IFR, many citing concerns for childhood obesity and stating that competitive food standards will reinforce healthy eating habits in school and outside of school. In addition to their overall support of the rule, an advocacy organization and an individual commenter stated that lower income students may not have the opportunity to experience healthier food items outside of the school. These commenters asserted that this rule will introduce these students to healthier foods and possibly influence home food consumption patterns and protect the nutritional needs of children. One trade association applauded the Department's encouragement of dairy foods consumption throughout the rule and urged that these changes be retained. One individual commenter remarked that the inclusion of recordkeeping and compliance requirements, consideration of special situations, and

implementation information makes this rule even more complete.

Although in support of the IFR in general, two commenters asserted that there are other factors that cause obesity in our society besides foods available in schools. For example, these commenters suggested that reducing physical education class in school has led to increased sedentary lifestyles of children. Commenters also noted the importance of supplementing nutrition requirements for foods available in schools with nutrition and health education in schools.

Some of those commenters concerned about the competitive food standards established in the IFR asserted that foods sold in schools are not the cause of childhood obesity and that the rule will result in significant revenue losses for school food service, citing financial strain on schools caused by the recently revised NSLP standards. Most of these comments were opposed to the rule in its entirety and did not comment on specific provisions of the IFR.

The Department acknowledges that there are many factors contributing to childhood obesity and supports the idea that developing a healthy nutrition environment in school plays an important role in combatting childhood obesity, as well. This rule reinforces the development of a healthy school

environment. In addition, the Department recognizes that nutrition and health education as well as physical activity are important to the development of a healthy lifestyle and encourages schools to develop local school wellness standards that incorporate these items into the school day.

In addition to public comments submitted during the formal comment period, USDA continued to respond to feedback and questions from program operators and other impacted parties throughout the implementation year in order to provide clarification, develop policy guidance, and inform us as the final rule was being developed.

The description and analysis of comments in this preamble focus on general comment themes, most frequent comments, and those that influenced revisions to this final rule. Provisions not addressed in the preamble to this final rule did not receive significant or substantial public comments and remain unchanged. The reasons supporting the provisions of the proposed and interim regulations were carefully examined in light of the comments received to determine the continued applicability of the justifications. Those reasons, enunciated in the proposed and interim regulations, should be regarded as the basis for this

final rule unless otherwise stated, or unless inconsistent with this final rule or this preamble. A thorough understanding of the rationale for various provisions of this final rule may require reference to the preamble of both the proposed rule published on February 8, 2013 (78 FR 9530) and the interim final rule published on June 28, 2013 (78 FR 39068).

To view all public comments on the IFR, go to [www.regulations.gov](http://www.regulations.gov) and search for public submissions under document number FNS-2011-0019-4716. Once the search results populate, click on the blue text titled, "Open Docket Folder." USDA appreciates the public comments and shared operator experiences as they have been essential in developing a final rule that is expected to improve the quality of all foods sold outside of the NSLP and SBP.

**IV. Summary of the Final Rule Competitive Food Standards**

The competitive foods and beverages standards included in the June 28, 2013, IFR were implemented on July 1, 2014, and are retained in this final rule with some modifications, as noted in the following chart in bold letters. The modifications or changes made in this final rule are discussed next in the preamble.

**SUMMARY OF FINAL RULE COMPETITIVE FOOD STANDARDS**

Food/nutrient	Standard	Exemptions to the standard
General Standard for Competitive Food.	To be allowable, a competitive FOOD item must: (1) Meet all of the proposed competitive food nutrient standards; and (2) Be a grain product that contains 50% or more whole grains by weight or have whole grains as the first ingredient; <i>or</i> (3) Have as the first ingredient one of the non-grain main food groups: fruits, vegetables, dairy, or protein foods (meat, beans, poultry, seafood, eggs, nuts, seeds, etc.); <i>or</i> (4) Be a combination food that contains at least ¼ cup fruit and/or vegetable. (5) If water is the first ingredient, the second ingredient must be one of the above.	<ul style="list-style-type: none"> <li>• Fresh and frozen fruits and vegetables with no added ingredients except water are exempt from all nutrient standards.</li> <li>• Canned fruits with no added ingredients except water, which are packed in 100% juice, extra light syrup, or light syrup are exempt from all nutrient standards.</li> <li>• Low sodium/No salt added canned vegetables with no added fats are exempt from all nutrient standards.</li> </ul>
NSLP/SBP Entrée Items Sold à la Carte.	Any entrée item offered as part of the lunch program or the breakfast program is exempt from all competitive food standards if it is served as a competitive food on the day of service or the day after service in the lunch or breakfast program.	
Grain Items .....	Acceptable grain items must include 50% or more whole grains by weight, or have whole grains as the first ingredient.	
Total Fats <sup>1</sup> .....	Acceptable food items must have ≤35% calories from total fat as served.	<ul style="list-style-type: none"> <li>• Reduced fat cheese (including part-skim mozzarella) is exempt from the total fat standard.</li> <li>• Nuts and seeds and nut/seed butters are exempt from the total fat standard.</li> <li>• Products consisting of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fats are exempt from the total fat standard.</li> <li>• Seafood with no added fat is exempt from the total fat standard.</li> </ul>

## SUMMARY OF FINAL RULE COMPETITIVE FOOD STANDARDS—Continued

Food/nutrient	Standard	Exemptions to the standard
Saturated Fats .....	Acceptable food items must have <10% calories from saturated fat as served.	<ul style="list-style-type: none"> <li>• Whole eggs with no added fat are exempt from the total fat standard.</li> </ul> <p>Combination products other than paired exempt foods are not exempt and must meet all the nutrient standards.</p> <ul style="list-style-type: none"> <li>• Reduced fat cheese (including part-skim mozzarella) is exempt from the saturated fat standard.</li> <li>• Nuts and seeds and nut/seed butters are exempt from the saturated fat standard.</li> <li>• Products consisting of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fats are exempt from the saturated fat standard.</li> <li>• Whole eggs with no added fat are exempt from the saturated fat standard.</li> </ul> <p>Combination products other than paired exempt foods are not exempt and must meet all the nutrient standards.</p>
Trans Fats .....	Zero grams of trans fat as served ( $\leq 0.5$ g per portion).	<ul style="list-style-type: none"> <li>• Dried whole fruits or vegetables; dried whole fruit or vegetable pieces; and dehydrated fruits or vegetables with no added nutritive sweeteners are exempt from the sugar standard.</li> <li>• Dried whole fruits, or pieces, with nutritive sweeteners that are required for processing and/or palatability purposes (<i>i.e.</i>, cranberries, tart cherries, or blueberries) are exempt from the sugar standard.</li> <li>• Products consisting of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fats are exempt from the sugar standard.</li> </ul>
Sugar .....	Acceptable food items must have $\leq 35\%$ of weight from total sugar as served.	
Sodium .....	Snack items and side dishes: $\leq 200$ mg sodium per item as served, including any added accompaniments. Entrée items: $\leq 480$ mg sodium per item as served, including any added accompaniments.	
Calories .....	Snack items and side dishes: $\leq 200$ calories per item as served, including any added accompaniments. Entrée items: $\leq 350$ calories per item as served including any added accompaniments.	
Accompaniments .....	Use of accompaniments is limited when competitive food is sold to students in school. The accompaniment must be included in the nutrient profile as part of the food item served and meet all proposed standards.	
Caffeine .....	Elementary and Middle School: foods and beverages must be caffeine-free with the exception of trace amounts of naturally occurring caffeine substances. High School: foods and beverages may contain caffeine.	
Beverages .....	<p>Elementary School</p> <ul style="list-style-type: none"> <li>• Plain water or plain carbonated water (no size limit);</li> <li>• Low fat milk, unflavored (<math>\leq 8</math> fl oz);</li> <li>• Non-fat milk, flavored or unflavored (<math>\leq 8</math> fl oz), including nutritionally equivalent milk alternatives as permitted by the school meal requirements;</li> <li>• 100% fruit/vegetable juice (<math>\leq 8</math> fl oz); and</li> <li>• 100% fruit/vegetable juice diluted with water (with or without carbonation), and no added sweeteners (<math>\leq 8</math> fl oz).</li> </ul> <p>Middle School</p> <ul style="list-style-type: none"> <li>• Plain water or plain carbonated water (no size limit);</li> <li>• Low-fat milk, unflavored (<math>\leq 12</math> fl oz);</li> <li>• Non-fat milk, flavored or unflavored (<math>\leq 12</math> fl oz), including nutritionally equivalent milk alternatives as permitted by the school meal requirements;</li> <li>• 100% fruit/vegetable juice (<math>\leq 12</math> fl oz); and</li> <li>• 100% fruit/vegetable juice diluted with water (with or without carbonation), and no added sweeteners (<math>\leq 12</math> fl oz).</li> </ul> <p>High School</p> <ul style="list-style-type: none"> <li>• Plain water or plain carbonated water (no size limit);</li> <li>• Low-fat milk, unflavored (<math>\leq 12</math> fl oz);</li> </ul>	

SUMMARY OF FINAL RULE COMPETITIVE FOOD STANDARDS—Continued

Food/nutrient	Standard	Exemptions to the standard
Sugar-free Chewing Gum ....	<ul style="list-style-type: none"> <li>• Non-fat milk, flavored or unflavored (≤12 fl oz), including nutritionally equivalent milk alternatives as permitted by the school meal requirements;</li> <li>• 100% fruit/vegetable juice (≤12 fl oz);</li> <li>• 100% fruit/vegetable juice diluted with water (with or without carbonation), and no added sweeteners (≤12 fl oz);</li> <li>• Other flavored and/or carbonated beverages (≤20 fl oz) that are labeled to contain &lt;5 calories per 8 fl oz, or ≤10 calories per 20 fl oz; and</li> <li>• Other flavored and/or carbonated beverages (≤12 fl oz) that are labeled to contain ≤40 calories per 8 fl oz, or ≤60 calories per 12 fl oz.</li> </ul> <p>Sugar-free chewing gum is exempt from all of the competitive food standards and may be sold to students at the discretion of the local educational agency.</p>	

**V. Discussion of Comments and Changes to the Final Rule**

*Definitions*

The amendments made by the HHFKA stipulate that the nutrition standards for competitive food apply to all foods and beverages sold: (a) Outside the school meals programs; (b) on the school campus; and (c) at any time during the school day. The IFR at § 210.11(a) included definitions of *Competitive food*, *School day*, and *School campus*.

*Competitive food* means all food and beverages other than meals reimbursed under programs authorized by the NSLA and the CNA available for sale to students on the *School campus* during the *School day*. Fifteen comments were received on this definition. Several commenters, including advocacy organizations and professional associations, generally agreed with the definition for “competitive food.” More specifically, these commenters supported that the competitive food standards will apply to all foods and beverages sold across the school campus and throughout the school day (until at least 30 minutes after school ends). An advocacy organization and an individual commenter suggested that FNS substitute the word “served” for the term “available for sale” in the definition of “competitive food” because doing so would send a more consistent message to students and families by assuring that all foods brought into the school were subject to the same standards. The Department

wishes to point out that the amendments made by the HHFKA do not provide the Secretary with jurisdiction over foods brought from outside of the school. Therefore, the definition for “competitive food” is unchanged in this rule.

*School day* means, for the purpose of competitive food standards implementation, the period from the midnight before, to 30 minutes after the end of the official school day. Thirty comments were received on this definition. Nine of those comments mentioned the applicability of the IFR to non-school hours.

Some commenters, including a trade association, a food manufacturer, and a school district, expressed support for the IFR definition for “school day.” However, more commenters disagreed with the IFR definition of “school day” primarily requesting that the definition should be expanded to include all times during which students are on campus and engaged in school-sponsored activities or all after-school hours in order to achieve the objective of promoting healthy food choices for children. Some commented that imposing competitive food standards during the school day but eliminating them after school sends a mixed message with regard to the need to eat healthy foods at all times.

In contrast, a trade association and a food manufacturer suggested that USDA should more narrowly define “school day” to exclude foods sold at school programs and activities that occur before the start of the instructional school day to achieve consistency with the treatment of afterschool activities. Other individual commenters suggested that the school day should start at the beginning of school and end at the dismissal bell in order to allow morning

and after school sales of noncompliant competitive foods.

The Department wishes to reiterate that section 208 of the HHFKA amended the CNA to require that the competitive food standards apply to foods sold at any time during the school day, which does not include afterschool programs, events and activities. In addition, as a reminder, these standards are minimum standards. If an LEA wishes to expand the application of the standards to afterschool activities, they may do so. The definition of “school day” is, therefore, unchanged in this final rule. In addition, in order to clarify the applicability of the competitive foods nutrition standards, if a school operates a before or after-school program through the Child and Adult Care Food Program or the NSLP, the meal pattern requirements of the appropriate program shall be followed.

*Paired Exempt Foods*

The competitive food standards provide exemptions for certain foods that are nutrient dense, even if they may not meet all of the specific nutrient requirements. For example, all fresh, frozen and most canned fruits as specified in § 210.11(d)(1) are exempt from all of the nutrient standards because we want to encourage students to consume more of these foods. Similarly, peanut butter and other nut butters are exempt from the total fat and saturated fat standards, since these foods are also nutrient dense and primarily consist of healthier fats.

A combination food is defined as a product that contains two or more foods representing two or more of the food groups: Fruit, vegetable, dairy, protein or grains. When foods are combined, they no longer retain their individual exemptions and must meet the nutrient standards that apply to a single item.

<sup>1</sup> Please note that the Total Fat nutrient standard is being maintained as an interim final standard. The Department is requesting additional comments on this standard in this rulemaking. Please see further discussion in Part V of this preamble.

However, the regulation did not specifically address the treatment of foods that are exempt from the regulatory requirements when they are simply paired and packaged with other products (without added ingredients) that are also exempt from one or more of the standards. Many of these “paired exemptions” are nutrient dense and contain foods that meet the intent of the competitive foods requirements. In response to concerns raised by operators in the first year of implementation, FNS issued policy guidance clarifying that “paired exempt foods” retain their individually designated exemption for total fat, saturated fat, and/or sugar when packaged together and sold. Paired exempt foods are required to meet the designated calorie and sodium standards specified in paragraphs § 210.11(i) and (j) at all times. Some examples of paired exemptions include:

- *Peanut Butter and celery.* Peanut butter is exempt from the total fat and saturated fat requirements. When it is paired with a vegetable or fruit, such as celery, the paired snack retains the total fat and saturated fat exemptions and may be served as long as the calorie and sodium limits are met.

- *Celery paired with peanut butter and unsweetened raisins.* As noted above, celery and peanut butter both have exemptions. Similarly, dried fruit, such as unsweetened raisins, are exempt from the sugar limit. However, calorie and sodium limits still apply to the snack as a whole.

- *Reduced fat cheese served with apples.* Reduced fat cheese is exempt from the total fat and saturated fat limits. When it is paired with a vegetable or fruit, such as apples, the paired snack is only required to meet the calorie and sodium limits.

- *Peanuts and apples.* Peanuts are exempt from the total fat and saturated fat limits. When peanuts are paired with a vegetable or fruit, such as apples, the paired snack is only required to meet calorie and sodium limits.

Operator implementation using the policy guidance was positive. Therefore, FNS is formalizing this policy clarification through this final rule by adding a definition of *Paired exempt foods* at § 210.11(a)(6).

#### *Definition of Entrée Item*

*Entrée item* was defined in § 210.11(a)(3) as an item that includes only the following three categories of main dish food items:

- A combination food of meat or meat alternate and whole grain rich food;
- A combination food of vegetable or fruit and meat or meat alternate; or

- A meat or meat alternate alone, with the exception of yogurt, low-fat or reduced fat cheese, nuts, seeds and nut or seed butters.

During the course of implementation, some questions were received with regard to packaging and selling two snack items together, such as a cheese stick and a pickle or a whole grain-rich cookie and yogurt, and considering that item to be an entrée in order to sell products with the higher entrée calorie and sodium limits. The proposed rule clearly expressed the Department’s intent that an entrée be the main dish in the meal. Therefore, in order to clarify the definition of “Entrée item”, the phrase “intended as the main dish” is being added to the regulatory definition.

Some commenters, including trade associations and food manufacturers, urged FNS to expand the definition of entrée to include a grain only, whole-grain rich entrée, on the basis that such foods are commonly served entrée items in the SBP (e.g., pancakes, cereal, or waffles). A trade association and a food manufacturer commented that if a breakfast item does not qualify for the definition of entrée item, it will be restricted to the 200-calorie limit for snack items, which falls well below the minimum calorie requirements for breakfast under the SBP.

An individual commenter recommended creating a separate definition of “breakfast entrée” to allow grain/bread items as an option. A professional association and a food manufacturer requested that typical breakfast foods, such as a bagel and its accompaniments be considered an entrée rather than a snack/side item at breakfast time or at lunch time. However, a State department of education, a community organization, and some individual commenters recommended that FNS not allow a grain-only entrée to qualify as a breakfast entrée item. The community organization argued that these items are of minimal nutritional value and typically involve the addition of high-sugar syrups. The State department of education commented that allowing grain-only entrée items under the competitive food regulations would allow schools to sell SBP entrée items such as muffins, waffles, and pancakes that would not otherwise meet the competitive food standards.

In view of the comments as well as input received on grain-only entrées during implementation of the IFR, the Department published Policy Memorandum SP 35–2014 to clarify that, although grain-only items were not included in the IFR as entrées, an SFA

is permitted to determine which item(s) are the entrée items for breakfasts offered as part of the SBP. The policy flexibility was well received and, therefore, this final rule amends the definition of “Entrée item” to include reference to whole grain rich, grain-only breakfast items served in the SBP, making them allowable breakfast entrées subject to the entrée exemptions allowed in the rule on the day of and the day after service in the SBP. Such entrée items also may be served at lunch in the NSLP on the day of or the day after service in the SBP.

In summary, this final rule makes no changes to the IFR definitions of *Competitive food*, *Combination foods*, *School day*, and *School campus* at § 210.11(a). This rule adds a definition of *Paired exempt foods* to allow paired exemption items to be sold in schools, and amends the definition of *Entrée item* to include: (1) A specific reference to grain only breakfast entrées served in the SBP, and (2) to incorporate the term “intended as the main dish” into the definition to further clarify the requirements for entrées as well as entrée exemptions.

#### *State and Local Educational Agency Standards*

Under § 210.11(b)(1) of the IFR, State and/or LEAs have the discretion to establish more rigorous restrictions on competitive food, as long as they are consistent with the provisions set forth in program regulations.

Thirty-five comments addressed this discretion and numerous commenters expressly supported the provision. Several commenters, including a school professional association, and individual commenters, urged FNS to not allow additional standards for competitive foods beyond the Federal standards because a national standard will allow manufacturers to produce food items at a lower cost. A trade association recognized that the IFR may not be preemptive, but requested that USDA not encourage States to create additional criteria for competitive foods. This commenter expressed concerns that inconsistent State policies for competitive foods will limit reformulation opportunities.

However, 12 advocacy organizations and an individual commenter expressed the need for a national framework for competitive foods and also expressed support for allowing States and localities to implement locally-tailored, standards that are not inconsistent with the Federal requirements. Similarly, some school professional associations and individual commenters supported allowing States the flexibility to create

their own restrictions on competitive foods, as needed.

The ability of State agencies and LEAs to establish additional standards that do not conflict with the Federal competitive food requirements is consistent with the intent of section 208 of the HHFKA, and with the operation of the Federal school meal programs in general. That discretion also provides an appropriate level of flexibility to States and LEAs to set or maintain additional requirements that reflect their particular circumstances consistent with the development of their local school wellness policies. Any additional restrictions on competitive food established by school districts must be consistent with both the Federal requirements as well as any State requirements.

This final rule makes no change to the provision allowing States and LEAs to establish additional competitive food standards that are not inconsistent with the Federal requirements. This provision may be found at § 210.11(b)(1).

#### *Suggestions To Prohibit Foods With Artificial Colors, Flavors and/or Preservatives*

Four individual commenters expressed concerns about continuing to allow the sale of foods that contain genetically modified organisms (GMO) and foods containing artificial ingredients, colors, and flavors. Just over 30 comments were received on other issues relating to food requirements. These comments included suggestions such as eliminating or putting limitations on high fructose corn syrup, sugar, fiber, and GMO foods. One individual commenter urged that all foods sold in schools should be organic.

The Food and Drug Administration (FDA) makes determinations regarding the safety of particular food additives and USDA defers to FDA on such determinations. As discussed previously, these standards are minimal standards that must be met regarding competitive foods sold in schools. This final rule continues to provide the flexibility to implement additional standards at the State and/or local level.

#### *General Competitive Foods Standards*

The rationale for many comments received on the IFR was consistency with the HUSSC and Alliance for a Healthier Generation standards. The Department wishes to point out that while those standards were considered in the development of the proposed rule, both of those standards have conformed to the USDA competitive

foods standards subsequent to publication of the IFR.

#### *Combination Foods*

The general nutrition standard in the rule at § 210.11(c)(2)(iv) specifies that combination foods must contain  $\frac{1}{4}$  cup of fruit or vegetables. The Department received 45 comments on this provision of the IFR, the majority of which urged us to reduce the fruit or vegetable components to  $\frac{1}{8}$  cup to be consistent with NSLP/SBP standards, which allow schools to credit  $\frac{1}{8}$  cup of fruit or vegetable toward the total quantity required for school meals. As indicated in the preamble to the IFR rule, maintaining the higher  $\frac{1}{4}$  cup quantity requirement for fruits/vegetables in combination foods generally supports the availability of more nutritious competitive food products and is consistent with the Institute of Medicine (IOM) recommendations and the DGA. Competitive foods are evaluated on the basis of the qualities of the individual product being sold as opposed to the quantity of the ingredients of the product being credited toward the meal pattern requirement in the NSLP or SBP. Moreover, it is important to note that combination foods with less than  $\frac{1}{4}$  cup of a fruit or vegetable may indeed qualify under the other food requirements specified in the rule, such as the whole grain rich or food group criteria, depending on the composition of the food item. It is only for those foods that qualify solely on the basis of being a competitive food product that contains a fruit or vegetable that this  $\frac{1}{4}$  cup specification is required. This food standard as specified in § 210.11(c)(2)(iv) is, therefore, retained in the final rule.

#### *Whole Grains*

One of the general standards for competitive foods included in § 210.11(c)(2)(ii) and (e) requires that grain products be whole-grain rich, meaning that they must contain 50 percent or more whole grains by weight or have whole grains as the first ingredient.

About 60 comments addressed this IFR requirement. Many commenters, including a State department of education, urged USDA to make the competitive food whole grain standard consistent with the NSLP/SBP whole grain standard. Several commenters, including a school professional association and individual commenters, supported the “whole grain rich” requirement. In particular, food manufacturers, trade associations, and a school district emphasized the importance of including the criteria that

the whole grains per serving should be greater than or equal to 8 grams in the whole grain-rich identifying criteria. Three individual commenters generally opposed the whole grain-rich requirement.

As indicated in the preamble to the proposed rule, this standard is consistent with the DGA recommendations, the whole grain-rich requirements for school meals and the prior HUSSC whole grain-rich requirement (HUSSC has subsequently updated the standards to conform to these competitive food standards). The Department wishes to point out that the whole grain criteria for competitive foods is used as a criterion for determining the allowability of an individual item to be sold as a competitive food, while school meals’ whole grain-rich criteria determine the crediting of the menu items toward the grain component of the meal. Allowing the additional measures for grain suggested by some commenters such as  $\geq 8$  grams of whole grain would not ensure that grain products in competitive food contain at least 50 percent whole grains and would require additional information from the manufacturer. Therefore, the whole grain-rich standard established in the interim final rule is affirmed in this final rule.

The food industry has made a significant effort to reformulate products to meet this standard and to reinforce the importance of whole grains to the general public as well. These efforts have resulted in the availability of numerous whole grain-rich products in the general public marketplace as well as in the foods available for service and purchase in schools. Maintaining this standard ensures that students have the flexibility to make choices among the numerous whole grain-rich products that are now available to them in school.

Since this competitive food standard is consistent with the DGA recommendations, the whole grain-rich requirements for school meals, and HUSSC standards, this final rule affirms the requirement as established by interim final rule.

#### *DGA Nutrients of Public Health Concern*

In recognition of the marketplace and implementation limitations, but also mindful of important national nutrition goals, the IFR implemented a phased-in approach to identifying allowable competitive foods under the general standard. For the initial implementation period in School Year 2014–15 through June 30, 2016 (School Year 2015–16), the general food standard included a criterion that if a competitive food met

none of the other General Standards, that food may be considered allowable if it contained 10 percent of the Daily Value of a nutrient of public health concern (*i.e.*, calcium, potassium, vitamin D, or dietary fiber). Effective July 1, 2016, this criterion was removed as a general criterion.

Eight commenters, including some food manufacturers, opposed the phase out of this criterion as a General Standard for allowable foods. However, information available to the Department indicates that industry has made major strides over the past three years and many manufacturers have come into compliance with the competitive food standards by reformulating their products in recognition of the fact that the 10-percent DV General Standard would become obsolete as of July 1, 2016. Prior to July 1, 2016, fewer than 21 products that depended solely on the 10-percent DV General Standard appeared on the Alliance for a Healthier Generation (AHG) Food Navigator as Smart Snacks compliant foods. There are currently about 2,500 Smart Snacks compliant products listed in the AHG product database. This means that items that had qualified based solely upon the 10-percent DV General Standard represented less than 1 percent (0.84 percent) of the products that had been captured in the Alliance Navigator.

Therefore, this final rule makes no changes to the General Standards for competitive foods established by the IFR and the 10-percent DV standard has expired as scheduled. Eliminating the 10-percent DV criterion more closely aligns the competitive food standards with the DGA, as required by the HHFKA.

Elimination of this standard aligns the competitive foods rule with the DGA which states that “nutrients should come primarily from foods” as well as the IOM recommendations which indicate that this approach “reinforces the importance of improving the overall quality of food intake rather than nutrient-specific strategies such as fortification and supplementation.”

#### *Specific Nutrient Standards § 210.11(d)-(k)*

In addition to the General Standards, the rule includes nutrient standards for specific nutrients contained in allowable foods. These include standards for total fat, saturated fat, trans fat, total sugars, calories and sodium. These standards apply to competitive foods as packaged or served to ensure that the competitive food standards apply to the item sold to the student.

Twenty commenters expressed general support for the IFR nutrient standards for competitive foods without discussing a specific element of the nutrient standards. Several advocacy organizations and professional associations agreed with requiring that all foods sold in schools meet the nutrient standards and with limiting calories, fats, sugars, and sodium in snack foods and beverages. A health care association expressed support for the nutrition standards adopted in the IFR suggesting that any changes made should strengthen the standards and not weaken them. Another health care association expressed the belief that the established limits will inherently preclude the sale of candy and other confections and products with added sugars that promote tooth decay. An individual commented that the nutrient standards will eliminate many seemingly healthy foods that are surprisingly laden with sugar, calories, fat, or salt. A trade association supported the use of a nutrition criteria-based system for competitive food standards, as opposed to a structure that allows and disallows specific foods, because manufacturers will have the opportunity to reformulate and innovate to meet the rule’s provisions.

Seven commenters expressed general opposition to the IFR nutrient standards for competitive foods without discussing a specific element of the nutrient standards. A few individual commenters expressed concerns that the IFR nutrient standards will encourage chemically processed low-fat foods and sugar substitutes at the expense of whole foods and natural sugars. A food manufacturer urged USDA to simplify the criteria for competitive foods by using only the calorie limit and eliminating the total fat, saturated fat, and sugar limits, arguing that the combined calorie limit and food group standards would be less burdensome to implement and would inherently limit fats and sugars.

The overwhelming majority of comments received on the proposed rule supported the nutrient standards and those standards were incorporated into the IFR with some minor changes. The IFR comments received on this issue were minimal and primarily supported the established standards. Therefore, this rule finalizes the nutrient standards as included in the IFR with the addition of several modifications being made to items exempt from those nutrient standards as discussed below.

#### *Fruits and Vegetables*

Generally consistent with both the IOM and the DGA, the IFR included an exemption to the nutrient standards for fresh, frozen and canned fruits and vegetables with no added ingredients except water or, in the case of fruit, packed in 100 percent fruit juice, extra light syrup or light syrup; and for canned vegetables that contain a small amount of sugar for processing purposes in order to maintain the quality and structure of the vegetable.

Ten comments expressed support for the IFR exemption from the nutrient standards for fresh, frozen, or canned fruits and vegetables. In particular, a school professional association and some individual commenters agreed with the decision to include “light syrup” in the exemption. A food manufacturer supported the inclusion of all forms of fruit, and products made with fruit, without added nutritive sweeteners, as competitive foods.

Three commenters recommended that the exemption for fruits and vegetables be more stringent. These commenters suggested that any added syrup contributes added unneeded sugars. Two trade associations supported the IFR provision that fruit packed in light syrup is exempt from the nutrition standards.

However, a few comments were received addressing the exemption parameters for canned vegetables—allowing an exemption only for those canned vegetables containing water and a small amount of sugar for processing. A trade association and a food manufacturer stated that they were not aware of any canned vegetables that contain only water and sugar for processing purposes. They indicated that sodium, citric acid, and other ingredients are commonly used in the processing of canned vegetables. They also pointed out that those processing aids are allowed to be used in the low sodium vegetables packed for the USDA Foods Program.

The Department wishes to point out that, although some sodium is used in processing canned vegetables, most canned vegetables would still meet the nutrient standards for sodium without being given a specific exemption. However, in light of the important nutrients provided by vegetables, for ease of operator implementation and in recognition of common processing procedures, the Department agrees that low sodium/no salt added canned vegetables should also benefit from the fruit and vegetable exemption. This final rule, therefore, revises the canned vegetable exemption to allow low

sodium/no salt added canned vegetables with no added fat to be exempt from each of the competitive food nutrient standards.

#### *Total Fat, Saturated Fat and Trans Fat*

To qualify as an allowable competitive food, the IFR at § 210.11(f) requires that no more than 35 percent of the total calories per item as packaged or served be derived from total fat and requires that the saturated fat content of a competitive food be less than 10 percent of total calories per item as packaged or served. In addition, as specified in § 210.11(g), a competitive food must contain zero grams of trans fat per portion as packaged or served (not more than 0.5 grams per portion).

While there are no exemptions from the trans fat standard, there are a number of exemptions from the total fat and the saturated fat standards. Seafood with no added fat is exempt from the total fat standard but is still subject to the saturated fat, trans fat, sugar, calorie and sodium standards. Exemptions included in the IFR to both the total fat and saturated fat standards include reduced fat cheese and part skim mozzarella cheese not included in a combination food item, nuts and seeds and nut/seed butters not included in a combination food item and products that consist of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fat. Such exempt products are still subject to other competitive food nutrient standards such as the trans fat, sugar, calorie and sodium standards.

#### *Total Fat*

Fifteen commenters, including a school professional association and several individuals, expressed support for the IFR competitive food restriction on total fat. No comments were received to make this standard more stringent. However, about 30 comments opposed the IFR restriction on total fat, arguing in favor of either making the restriction less stringent or eliminating the standard entirely. Two trade associations asserted that the total fat limit is inconsistent with the NSLP/SBP standards, which limit saturated fat and trans fat but not total fat. These commenters suggested that limitations on calories, saturated fat, and trans fat in competitive food standards will ensure that the foods are low in total fat. Similarly, a school district also recommended removing the total fat limit, asserting that such a limit is inconsistent with the NSLP/SBP requirements and will place an undue burden on menu planners.

Fifty-five comments addressed the IFR exemptions from the total fat limit. Three trade associations and a food manufacturer expressed support for the exemption for part-skim mozzarella. Two individual commenters, however, opposed the exemption for reduced-fat cheese and part-skim mozzarella, asserting that whole foods may be healthier than low-fat alternatives. Three trade associations and a school district favored extending the exemption for reduced-fat cheese to all cheese that meets the calorie limits.

Some commenters suggested various other modifications to the standards for individual foods, such as eggs, yogurt, and full fat cheese. A couple of comments dealt with various combinations of food items that are effectively dealt with in this final rule with the addition of a definition of *Paired exempt foods* discussed previously in this preamble.

One commenter mistakenly noted that alternative milk products allowed in the reimbursable meals programs may not meet these requirements. We wish to clarify that total fat, saturated fat and trans fat standards do not apply to beverages.

The Department recognizes that there may be foods that are commonly enjoyed by students and are generally healthy, but do not currently meet the competitive food standards due to the total fat content. Specifically, we are aware that some legume-based spreads/dips may offer significant nutritional benefits, but may not be able to meet total fat standards due to the inherent fat content of key ingredients in traditional legume based spreads or dips, such as hummus. Another common and generally healthy snack food is guacamole. Although avocado is currently exempt from the total fat standard because it is a fruit, when other non-fruit or vegetable ingredients are added to make a dip, the exemption is lost and the total fat standard is exceeded. Other common and generally healthy foods that may benefit from removal of the total fat standard include snack bars and salads with dressing.

Because the DGAs are based on the latest scientific research and do not have a key recommendation for total fat and to address commenter requests for consistency between standards for competitive foods sold in schools and the NSLP/SBP, the Department has determined that further comment should be accepted on the total fat standard. In particular, comments are requested on whether the standard for total fat should be eliminated given that there will continue to be standards in place for calories, sodium, saturated fat,

and trans fats which will limit unhealthy fats. Comments are also sought on whether the total fat standard should be maintained but should exempt certain food items. While the total fat standard as currently implemented will continue to be in place, this single, individual standard remains an interim final standard. The Department, as previously noted, will accept public comments on this standard only. The Department is interested in comments related to the impact revising or eliminating the total fat standard may have. This could include allowing more items to be sold that are lower in unhealthy, saturated fats but that might be higher in healthy, unsaturated fats and simplifying implementation for local operators. Commenters also should consider whether there could be unintended consequences to revising or eliminating the total fat standard. As noted above, commenters should keep in mind that the standards for calories, sodium, saturated fat, and trans fat remain in place and will continue to limit the types of foods that may be sold in schools.

#### *Saturated Fat (<10% of Calories)*

Twenty comments expressed support for the IFR competitive food restriction on saturated fat. A school district recommended consistency with NSLP/SBP by only calculating saturated fat and total calories.

Twenty-five commenters were opposed to the IFR restriction on saturated fat, arguing in favor of either making the restriction less stringent or eliminating the standard entirely. A school professional association and individual commenters argued that the standard is too restrictive and will exclude grilled cheese, chicken tenders, hot dogs, pizza, and healthy option entrées.

Forty-five comments addressed the IFR exemptions from the saturated fat limit. Most of the comments requested saturated fat exemptions for the same products for which they requested total fat exemptions discussed above. Three trade associations and a school district favored extending the saturated fat exemption to all cheese that meets the calorie limits.

Additional comments specifically addressed exemptions from the saturated fat limit. A professional association and several individual commenters suggested that the saturated fat standard should exclude eggs or cheese packaged for individual sale and for non-fried vegetables and legumes.

Seven comment letters included other comments relating to the IFR saturated

fat limit. Two trade associations and a food manufacturer requested that FNS clarify a conflict in the IFR. These commenters stated that the “Summary of Major Provisions” in the preamble states that competitive foods must contain “no more than 10 percent” of total calories from saturated fat, but § 210.11(f)(1)(ii) states that the saturated fat content of a competitive food must be “less than 10 percent” of total calories. The Department wishes to clarify that the requirement as included in the regulatory provision at § 210.11(f)(1)(ii) that the saturated fat content of a competitive food must be *less than 10 percent* of total calories is correct.

The Department does not agree that all cheese should be exempt from the total fat and saturated fat standards because the total fat standard included in the IFR is identical to the recommended IOM standard for total fat, and the saturated fat standard is consistent with the DGA recommendations.

#### *Trans Fat (Og as Stated on the Label)*

Twenty comments addressed the IFR trans fat restriction. Several commenters, including a school professional association and some individual commenters who supported the total fat and saturated fat limits, also expressed support for the IFR trans fat limit. A school district also expressed support for the IFR limitation of zero grams of trans fat in competitive foods. To reduce confusion among school food service workers and State auditors, a trade association and a food manufacturer recommended that the phrasing of the trans-fat provision for competitive foods should be consistent with the provision in the NSLP/SBP requirements, which does not apply to naturally occurring trans fats present in meat and dairy products. While trans fat content is normally indicated on the label, the Department will provide additional guidance as necessary on this issue through technical assistance resources.

#### *Exemption for Eggs With No Added Fat*

The competitive food standards in the IFR provided that, in order to qualify as an allowable competitive food, no more than 35 percent of calories may be contributed by total fat, and less than 10 percent of a food’s calories may come from saturated fat. Eggs do exceed these fat standards. However, similar to nut butters, reduced-fat cheese, and seafood, eggs exceed the competitive foods fat standards and are nutrient dense. Eggs are high in protein and contain essential nutrients including, B vitamins, Vitamin

E, Vitamin D, iron, zinc, and magnesium. While eggs are high in fat, the DGA recommends increased consumption of nutrient dense foods and includes eggs in a healthy eating pattern. Evidence suggests that one egg a day does not increase a person’s risk for high cholesterol or cardiovascular diseases. In addition, some previous State agency standards as well as the previous standards implemented by the Alliance for a Healthier Generation did allow eggs for the reasons cited above.

Therefore, in response to comments, the nutrient profile of eggs mentioned above and operator requests to allow this nutrient dense and low cost option, this final rule is amended to add an exemption from the total fat and saturated fat standards for whole eggs with no added fat. This exemption appears in § 210.11(f)(iv).

#### *Calorie and Sodium Standards for Competitive Foods*

##### *Calories*

Some commenters supported the IFR competitive food calorie limits. In particular, a health care association urged USDA not to grant requests to increase the IFR calorie limits because doing so would increase the likelihood that students would choose and consume more than the recommended number of calories, which this commenter asserted would undermine USDA’s efforts to address the childhood obesity epidemic. A food manufacturer urged replacing the sugar and fats nutrition standards with only the calorie limit.

Many commenters expressed opposition to the calorie limits for competitive foods. Commenters said the proposed limits were too stringent and would limit student access to many food products, particularly a la carte foods sold during the meal service. Some commenters provided specific suggestions for alternative calorie limits for snacks, ranging from 240 to 300 calories, and for entrées, ranging from 400 to 500 calories.

Fifteen commenters addressed age and grade groupings, several suggesting separate calorie limits by grade, similar to the structure of the school meal patterns, reasoning that children have different calorie needs as they grow.

This final rule retains the calorie limits for snacks/side dishes (200 calories per item as packaged or served), and entrée items (350 calories per item as packaged or served), which are consistent with IOM recommendations and some voluntary standards. The Department does not agree that higher limits are appropriate, as suggested by

some commenters, particularly since it is not possible to limit the number of competitive food items that may be purchased. We appreciate that separate calorie limits by grade levels for snacks would align with existing voluntary standards that many schools have adopted, and would be more tailored to the nutritional needs of children of different ages. However, separate calorie limits for different grade levels would also add complexity for local program operators with schools of varying grade levels. State agencies or school districts could choose to implement varying calorie limits based on grades, provided the maximum level does not exceed the limit in this final rule. Please note that the calorie limit for entrée items would apply to all entrées that do not meet the exemption for NSLP/SBP entrée items.

The Department wishes to point out that great strides have been made in the availability of competitive foods that meet the standards. Numerous products have been reformulated and/or repackaged to ensure that the products meet the competitive foods standards and those products have been made available to schools for sale to students. In addition, many changes have been made to the a la carte offerings available in the cafeteria and these changes are contributing greatly to the overall healthy environment that is so important in our schools.

##### *Sodium*

Under the IFR at § 210.11(i), snack items and side dishes sold à la carte could contain no more than 200 calories and 230 mg of sodium per portion as served, including the calories and sodium in any accompaniments, and must meet all other nutrient standards for non-entrée items. The IFR stipulated that as of July 1, 2016, snack items and side dishes must have not more than 200 calories and 200 mg of sodium per item as packaged or served. Under the IFR at § 210.11(j), entrée items sold à la carte could contain no more than 350 calories and 480 mg sodium per portion as served, including any accompaniments, and meet all other nutrient standards.

Several comments, including one from a health care association and two from individuals, agreed with the IFR sodium provisions. The health care association argued that although some commenters urge USDA to create “consistent” sodium standards for the NSLP/SBP and competitive foods standards, the sodium limits for the school meals program apply to an entire meal, while the sodium limits for competitive foods only apply to one component of a meal—a single entrée,

side dish, or snack. Therefore, this commenter reasoned that the sodium limits for competitive food items should be lower than those for a reimbursable meal. An individual commenter acknowledged that sodium limits will alter the tastes of many foods, but suggested that there are many other spices, herbs, and other ways to enhance the flavors of foods without increasing the risk of hypertension.

Several commenters recommended that the sodium reductions should continue to be phased in gradually to allow taste preferences and manufacturers additional time to adjust. Some commenters provided suggestions for higher sodium limits, ranging from 230 mg to 360 mg for snacks and 550 mg to 650 mg for entrées. One commenter, a manufacturer, wanted USDA to add an exemption to the sodium limit for natural reduced fat cheese and reduced fat, reduced sodium pasteurized processed cheese.

The Department's standards for sodium were based on the IOM recommendations. The proposed "per portion as served" standards for competitive food were considered in the context of the DGAs and of the overall sodium limits for school meals, the first of which took effect in School Year 2014–15, the same school year these competitive food standards were implemented. USDA acknowledges that sodium reduction is an issue that impacts the broader marketplace, not just schools, and understands that sodium reduction is a process that will take time.

In recognition of the fact that there were existing voluntary standards for competitive food that had the higher sodium limit of 230 mg for snacks/side dishes, which meant there were existing products that had been formulated to meet the higher standard available to schools, the IFR set the initial limit for sodium for snacks and side dishes at 230 mg per item as packaged or served, for the first two years of implementation of these standards. The IFR provided that, as of July 1, 2016, the sodium limit for snacks and side dishes shall be reduced to 200 mg per item as packaged or served.

It is evident that many manufacturers have developed new products or reformulated existing products to meet the July 1, 2016, 200 mg standard. The Department believes that the phased in approach taken in the IFR did work to ensure product availability for schools for initial implementation and provided ample time for manufacturers to adjust to meet the lower limit. Therefore, this final rule does not change the sodium requirement for snacks and side dishes.

The sodium standard of 230 mg for snacks and side dishes expired as scheduled and the 200 mg standard is implemented as of July 1, 2016. In addition, the entrée limit of 480 mg per item as packaged and served will remain in place. The Department wishes to point out that any entrées served in school meals will be covered under the NSLP/SBP entrée item exemption in § 210.11(c)(3)(i).

#### *Total Sugars in Competitive Foods*

The IFR at § 210.11(h)(1) provided that not more than 35 percent of the *weight* per item as packaged and served could be derived from total sugars. In addition, § 210.11(h)(2) provided the following exemptions to the total sugar standard:

- Dried whole fruits or vegetables; dried whole fruit or vegetable pieces; and dehydrated fruits or vegetables with no added nutritive sweeteners;
- Products that consist of only dried fruit with nuts and/or seeds with no added nutritive sweeteners or fat; and
- Dried fruit with nutritive sweeteners required for processing and/or palatability purposes. (At this time, this applies to dried cranberries, tart cherries and dried blueberries only.)

Most commenters generally supported the application of the total sugars by weight standard. Many commenters stated that this standard provides flexibility and would allow the sale of more products that are favorites among students.

A trade association expressed the opinion that a restriction on sugar is not a necessary component of the competitive food standards because calorie limits will prevent excess sugar consumption. A State department of education and an individual suggested expressing the sugar limit in grams rather than percentages. Several commenters indicated that sugar limits would force manufacturers to produce foods which are actually less healthy in order to meet that standard. Another food manufacturer expressed support for a sugar restriction based on percent calories by weight, although stating that it did not believe a total sugar limit is warranted. A trade association and a food manufacturer asserted that the sugar criterion of 35 percent by weight is in line with the Alliance for a Healthier Generation guidelines, which was the basis of many products specially formulated for schools. The trade association added that for foods that naturally contain fat and sugar, such as dairy products, making lower fat versions of these products reduces the percentage of calories from fat, which increases the percentage of calories from

sugar, so a sugar limit based on weight is preferable.

Two comments, one received from an advocacy organization and another from an individual commenter, favored a sugar limit as a percent of calories arguing that such an alternative would be more protective. The individual asserted that there are many foods that would be disallowed were the standard 35 percent sugar by calories, but will be allowed because the sugar limit is a percentage of calories by weight.

The Department acknowledges that this standard allows more products to qualify to be sold as a competitive food in schools but wishes to point out that the portion sizes of these and all foods would be limited by the calorie and fat standards. State agencies and school districts could choose to implement a sugar standard based on calories, provided that it is at least as restrictive as the regulatory standard (*i.e.*, no allowable product under the calorie measure could exceed 35 percent sugar by weight).

Most commenters supported the exemptions to the total sugar requirement as well as the provision allowing an exemption for dried fruit with nutritive sweeteners required for processing and/or palatability purposes. (At this time, this applies to dried cranberries, tart cherries and blueberries only.) A school district requested guidance listing specific dried fruits that require nutritive sweeteners and urged that this list be maintained as guidance rather than as part of the rule so that USDA has flexibility to modify the list as warranted without requiring rulemaking. A trade association commended USDA for agreeing to issue future guidance on determining which dried fruits with added nutritive sweeteners qualify for the exemption. The portion sizes of these dried fruits would be limited by the calorie standards.

A few commenters requested that processed fruit and vegetable snacks (*e.g.*, fruit strips, fruit leathers or fruit drops) be included under the exemption for dried fruit, as many are processed with concentrated fruit puree. The Department, however, does not agree that processed fruit and vegetable snacks should be included under either dried fruit/vegetable exemption. These snack type products are not whole dried fruit pieces and the concentrated fruit puree or juice concentrate used to make these products is often the primary ingredient. These products could still qualify without the exemption as a competitive food if they meet all of the standards, including having a fruit or vegetable as the first ingredient.

The 2015–2020 DGA contain specific recommendations on limiting *added* sugar. This recommendation specifies that no more than 10 percent of calories should come from added sugars. The competitive food standards address sugar content in the context of the percentage of sugar by weight of the product sold. The standards do not include a focus on added sugars, or added sugars representing a particular percentage value compared to calories. The rationale for limiting sugar by weight in the IFR was that a sugar by weight standard was included in a number of voluntary standards reviewed during the development of the proposed rule, and, generally, this standard was supported by commenters as providing the most flexibility for program operators. The Department acknowledged in both the proposed rule and IFR that a sugar standard based on added sugars is preferable but that such a standard would be very difficult for local program operators to implement and for State agencies to monitor, because the current Nutrition Facts label does not differentiate between naturally occurring and added sugars. The Department has consistently indicated that the sugar standard included in this rule will be reconsidered if the Nutrition Label is updated to reflect added sugars. On May 27, 2016, the FDA published a final regulation which included a requirement that added sugars in foods be included on the Nutrition Facts Label (81 FR 34000). The new labeling requirements will be fully implemented by summer 2019. Because of the implementation period of the labeling rule, FNS is maintaining in this final rule the sugar standard that was put forth in the interim final rule. The Department will monitor implementation of the new labeling requirements and, in the future, anticipates updates to program regulations and guidance regarding the sugar standard, particularly considering how to set standards for added sugars in competitive foods sold to students on the school campus during the school day.

Therefore, this final rule continues to require in § 210.11(h)(1), that the total sugar content of a competitive food must be not more than 35 percent of *weight* per item as packaged or served and retains the exemption included in § 210.11(h)(2) to the total sugar content standards for dried fruit with added nutritive sweeteners that are required for processing and/or palatability purposes (currently dried cranberries, tart cherries and blueberries). USDA will issue any necessary future guidance

when a determination is made to include any additional dried fruits with added nutritive sweeteners for processing and/or palatability to qualify for this exemption.

*Exemptions for Some or All of the Nutrition Standards for Menu Items Provided as Part of the NSLP/SBP*

The IFR exempts NSLP/SBP entrée items from the competitive food standards when served as a competitive food on the day of service or the day after service in the reimbursable lunch or breakfast program. Six commenters expressed support for this approach regarding NSLP/SBP menu items sold as competitive foods. Most of these commenters, including advocacy organizations and a health care association, urged USDA not to grant requests to expand the exemption for NSLP/SBP items sold a la carte to, for example, include side dishes. Some of these commenters stated that expanding the exemption would undermine or weaken the competitive food standards. One advocacy organization expressed support that the IFR will require NSLP/SBP side dishes sold a la carte to meet the competitive food standards. Another advocacy organization stated that the approach taken in the IFR will allow for reasonable flexibility for the school food service while also addressing concerns regarding the frequency with which particular food items are available.

Fifteen comments recommended that NSLP/SBP entrées should not receive an exemption from the competitive food standards at any time. Some commenters argued that reimbursable meals are designed to provide a variety of foods and beverages that, over the course of a week, create a balance of all nutrients, while limiting calories, fats and sodium, and this balance can be disrupted when individual foods may be chosen at the expense of the whole meal. Specifically, a health care association commented that because schools are allowed to balance the nutrition components of reimbursable meals over a week, foods that may exceed the limits for fat, sodium, and calories can be included in a reimbursable meal when balanced over the week with healthier sides. For this reason, an advocacy organization stated that the exemption for a la carte NSLP/SBP entrées from the competitive food standards will allow children to continue to purchase less healthy entrée items a la carte instead of nutritious snack foods or more balanced reimbursable meals.

Several advocacy organizations and a professional association argued that allowing the sale of any foods that are

inconsistent with the competitive food standards will undermine the IFR and efforts of parents to provide healthy food options to children. This commenter asserted that although the exemption for a la carte NSLP/SBP entrée items only exists on the day and day after it is served as part of a reimbursable meal, many schools—particularly high schools that offer multiple meals each day—may offer popular items like pizza, breaded chicken nuggets, and burgers every day or nearly every day.

One advocacy organization recognized the importance of consistency between foods served in meals and a la carte and argued that there can be consistency without exempting a significant number of a la carte items from competitive food standards. This commenter stated that if individual items meet the competitive food standards, they should have no problem fitting into healthful NSLP/SBP menus, which would allow for consistency and flexibility, while also safeguarding children's health.

One hundred commenters suggested that the competitive food standards should exempt NSLP/SBP entrée items sold a la carte regardless of the day on which they are served as part of the reimbursable meal. Many of those commenters argued that once an item is served that meets reimbursable meal pattern guidelines, it should be allowed to be sold as a competitive food without frequency restrictions. Some stated that such an exemption would ease menu planning and operational issues as well as reduce confusion. These comments were primarily made by trade associations and food industry commenters as well as some school food service organizations.

Closely associated with the issue of exempting NSLP and SBP entrées on the day served and the day after served in the reimbursable meal is the lack of an exemption for side dishes served in the reimbursable meals. Commenters were also split on whether or not such food items should enjoy an exemption from the competitive food standards. Eighty commenters urged that NSLP/SBP side items sold a la carte should be exempt from competitive food standards. Many of the arguments made to support this view were the same as those discussed above related to the suggestion that all NSLP/SBP entrée items should be exempt from all competitive food standards regardless of day served. Other commenters indicated that side items should not be exempt from the competitive food standards.

USDA understands the concerns of commenters on both sides of this issue.

Given the circumstances surrounding NSLP and SBP meal planning as well as the increase in healthful entrées being served, it is important to maintain some flexibility when it comes to NSLP and SBP entrées. However, there is a distinction to be made between the meal patterns for reimbursable meals and the competitive food standards. The NSLP and SBP offer meals over the course of the school week and less nutritious selections may be balanced out with healthier items over the course of the week. Competitive food standards are based on the nutrients that are provided by individual food items that are sold to students on the school campus during the school day. In addition, it is important to note that it appears that many schools have successfully adapted to this requirement, some by expanding the number of entrées available to students on a daily basis and others by incorporating side items that meet the competitive foods requirements into their reimbursable meal menus.

Therefore, the exemption for NSLP/SBP entrée items only is retained. Side dishes sold à la carte would be required to meet all applicable competitive food standards. The exemption for the entrée item is available on the day the entrée item is served in NSLP/SBP, and the following school day. Entrée items are provided an exemption, but side dishes are not, in an attempt to balance commenter opposition to any exemptions for NSLP/SBP menu items and needed menu planning flexibilities. The approach adopted in this rule supports the concept of school meals as being healthful, and provides flexibility to program operators in planning à la carte sales and handling leftovers. We anticipate that this approach, along with the recent changes to school meal standards will continue to result in healthier menu items in meals than in the past, including entrées. Exempt entrées that are sold as competitive food must be offered in the same or smaller portion sizes as the NSLP and SBP.

#### *Guidance on Competitive Foods*

Several commenters requested information on a variety of other issues specific to individual foods. Many of these questions have been clarified in the extensive guidance issued by the Department in policy memoranda and other materials that are available on our Web site at <http://www.fns.usda.gov/healthierschoolday/tools-schools-focusing-smart-snacks>. We encourage interested parties to review these materials since they are updated frequently. In addition, the Alliance for a Healthier Generation, in partnership with FNS, has developed extensive

resources including guidance materials and the Competitive Foods Calculator and Navigator, which provide a way to evaluate individual foods and beverages as well as a listing of Smart Snacks allowable foods and beverages, respectively. These items are available at [www.healthiergeneration.org](http://www.healthiergeneration.org).

#### *Accompaniments*

The IFR at § 210.11(n) limited the use of accompaniments to competitive food, such as cream cheese, jelly, butter, salad dressing, etc., by requiring that all accompaniments be included in the nutrient profile as part of the food item served. Two commenters supported requiring accompaniments to be included in the nutrient profile as part of the food item served. A State department of education commented that the requirement to include the nutrient content of accompaniments in the nutrient profile of the product is appropriate and reasonable because condiments can contribute significant calories, sugar, fat and/or sodium. A school district expressed support for the IFR requirements relating to accompaniments not requiring pre-portioning, but requiring that they be included in the nutrient profile of competitive foods. Forty-five commenters opposed the requirement by suggesting that a weekly calorie range should be applied or that there should be no consideration of accompaniments.

The Department maintains that it is important to account for the dietary contribution of accompaniments in determining whether a food item may be served as a competitive food. Accompaniments can provide substantial sodium, sugar and/or calories to food items sold. Therefore, the requirement that accompaniments be included in the nutrient profile of foods is retained. As provided in the IFR, schools may determine the average serving size of the accompaniments at the site of service (e.g., school district). This is similar to the approach schools have used in conducting nutrient analysis of school meals in the past. Schools have successfully implemented this requirement and have not had difficulty in determining the average serving size of accompaniments that are used in schools, but the Department will provide further guidance if necessary.

#### *Nutrition Standards for Beverages*

The IFR at § 210.11(m) established standards for allowable beverage types for elementary, middle and high school students. At all grade levels, water, low fat and nonfat milk, and 100 percent juice and 100 percent juice diluted with

water with no added sweeteners are allowed in specified maximum container sizes, which varied by grade level. The rule also allows additional beverages for high school students in recognition of the wide range of beverages available to high school students in the broader marketplace and the increased independence such students have, relative to younger students, in making consumer choices.

#### *General Comments on Beverage Requirements*

Ten commenters expressed general support for the beverage standards included in the IFR. Sixty-five commenters generally opposed the ICR beverage standards and cited a variety of reasons, from wanting to allow all grade levels to have no-calorie/low calorie beverages to opposing allowing high school students to have no-calorie/low calorie beverages available to them in school. A few commenters asserted that milk is produced in 8 ounce and 16 ounce containers and that requiring a limit of 12 ounce size milk for middle school and high school students may be problematic. While some commenters recommended larger portion sizes for all beverages, others recommended smaller portion sizes, particularly related to juice products. Still other commenters wished to restrict food colorings and other ingredients in 100 percent juice. Several commenters indicated that no-calorie/low calorie beverages should not be allowed in high school due to the inclusion of non-nutritive sweeteners in such beverages. While about 40 commenters supported the removal of the time and place restriction on the sale of other beverages in high school lunchrooms during the meal service, several commenters objected to the elimination of the restriction and a few indicated that such beverages should not be sold in any location at any time in high schools.

A few commenters suggested that USDA use only two grade groups for the beverage standards—elementary and secondary—to ease implementation. Some commenters stated that it would be difficult and/or costly to administer the beverage requirements in combined grade campuses, such as 7–12 or K–12. In response, USDA appreciates that implementation could be more difficult in schools with overlapping grade groups, but considers it important to maintain in the final rule the three grade groupings included in the IFR. These groupings reflect the IOM recommendations and appropriately provide additional choices to high school students, based on their increased level of independence. USDA

has provided guidance on this issue and will continue to provide technical assistance and facilitate the sharing of best practices as appropriate.

#### Other Beverages for High School

Most of the comments received on the IFR beverage requirements dealt with the standards for other beverages allowed in high school. A number of commenters wanted no-calorie and low-calorie beverages to be available in elementary and middle schools as well as high schools, while others opposed these beverages at any grade level. Several commenters stated that although schools may impose more stringent standards, schools may choose to sell diet beverages because the sale of such drinks are profit making. Other commenters indicated that if schools are not allowed to sell no-calorie/low calorie beverages in high school students will purchase them elsewhere and bring them to school.

USDA appreciates the input provided by commenters. The Department maintains that, given the beverages available in the broader marketplace and the independence that high school students enjoy, low calorie/no-calorie beverages may be sold in high schools. However, we do not agree that such beverages should be available to elementary and middle school students in school. No changes are made to this standard.

#### Caffeine

The IFR at § 210.11(l) required that foods and beverages available in elementary and middle schools to be caffeine free, with the exception of trace amounts of naturally occurring caffeine substances. This is consistent with IOM recommendations. The IFR did, however, permit caffeine for high school students.

Four commenters agreed with the IFR caffeine provisions. A food industry commenter expressed support for limited beverage choices for young children but allowing a broader range of products, including those containing typical amounts of caffeine, in high schools, given the increased independence of high school students. A trade association agreed that high school students should have access to beverages that contain caffeine and asserted that in 1987 FDA found no evidence to show that the use of caffeine in carbonated beverages would render such beverages injurious to health. This commenter asserted that its members provide a wide array of low- and no-calorie beverages to high schools, some of which contain modest amounts of caffeine, but member companies have

voluntarily instituted policies against the sale of caffeinated beverages marketed as energy drinks to schools. Two school districts supported caffeinated beverages for high school students.

Forty-five commenters opposed the IFR caffeine provisions, generally because it will allow foods and beverages in high school to contain caffeine. Those commenters were primarily concerned about the use of caffeinated low-calorie energy drinks that contain unregulated amounts of caffeine and other additives.

An advocacy organization cited warnings from the American Academy of Pediatrics and added that aggressive marketing of caffeinated products is designed to appeal to youth and there is a lack of information on caffeine content on food labels. Several commenters opposed allowing the sale of caffeinated drinks in high schools, particularly drinks with high levels of caffeine and no nutritive value.

USDA is concerned, as are some commenters, that some foods and beverages with very high levels of caffeine may not be appropriate to be sold in schools, even at the high school level. The FDA has not set a daily caffeine limit for children, but the American Academy of Pediatrics discourages the consumption of caffeine and other stimulants by children and adolescents. However, the health effects of caffeine are currently being considered by the FDA and the IOM. FDA did announce that it will investigate the safety of caffeine in food products, particularly its effects on children and adolescents. The FDA announcement cited a proliferation of products with caffeine that are being aggressively marketed to children, including "energy drinks." FDA, working with the IOM, convened a public workshop on August 5–6, 2013, to review existing science on safe levels of caffeine consumption and the potential consequences to children of caffeinated products in the food supply. The workshop did not result in any recommendations but a report was produced and may be found at <http://iom.nationalacademies.org/Reports/2014/Caffeine-in-Food-and-Dietary-Supplements-Examining-Safety.aspx>. USDA will continue to monitor efforts by FDA to identify standards regarding the consumption of caffeine by high school aged children.

Therefore, given the lack of authoritative recommendations at this time, this rule will not prohibit caffeine for high school students. However, USDA acknowledges commenters' concerns and encourages schools to be

mindful of the level of caffeine in food and beverages when selecting products for sale in schools, especially when considering the sale of high caffeine products such as energy drinks. It is also important to note that local jurisdictions have the discretion to further restrict the availability of caffeinated beverages should they wish to do so.

The caffeine provisions as included in the IFR at § 210.11(k) are not changed.

#### Non-Nutritive Sweeteners

The IFR did not explicitly address the issue of non-nutritive sweeteners; however, the rule allowed calorie-free and low-calorie beverages in high schools, which would implicitly allow beverages including non-nutritive sweeteners.

Ten commenters addressed the use of non-nutritive sweeteners in food products. Some commenters opposed allowing artificially sweetened beverages. For example, some commenters opposed the sale of diet sodas, whereas others stated that there is little evidence regarding the advisability of intake of sugar-sweetened beverages versus intake of non-nutritive sweeteners in beverages. In contrast, some commenters supported the use of non-nutritive sweeteners. USDA appreciates commenter input but is not explicitly addressing the use of non-nutritive sweeteners in the regulatory text of this final rule. Local program operators can decide whether to offer food and/or beverage items for sale that include non-nutritive sweeteners.

#### Other Requirements

##### Fundraisers

The IFR at § 210.11(b)(4) requires that food and beverage items sold during the school day meet the nutrition standards for competitive food but allows for special exemptions for the purpose of conducting infrequent school-sponsored fundraisers, as specified in the HHFKA. The provision included in the IFR was that exempt fundraiser frequency would be determined by the State agency during such periods that schools are in session. The IFR also required that no specially exempted fundraiser foods or beverages may be sold in competition with school meals in the food service area during the meal service.

Ten commenters indicated that USDA should establish the number and type of fundraisers that are exempt from the competitive food standards to ensure consistency among States. Other commenters recommended that the Department set parameters for the minimum and maximum numbers of

exempt fundraisers based on the size of schools. Thirty comments suggested that all food fundraisers taking place in schools be required to adhere to the competitive food standards at all times. Some commenters indicated that allowing exempt fundraisers will create confusion among parents, students and staff. A number of commenters noted that the approval of exempt fundraisers should be governed by the school wellness policies. Thirty commenters indicated that time and place restrictions on exempt fundraisers should apply not only to the food service area during the meal service but to all locations in the school during the meal service and some suggested placing timeframes on when such fundraisers may be held (for example: one hour after the school lunch service is completed).

The final rule retains the requirements regarding the responsibility of the State agency to determine the frequency of exempt fundraisers in schools. In addition, the rule continues to stipulate that there are no limits on the sale of food items that meet the competitive food requirements (as well as the sale of non-food items) at school fundraisers. In addition, the Department wishes to remind the public that the fundraiser standards do not apply to food sold during non-school hours, weekends and off-campus fundraising events such as concessions during after-school sporting events.

USDA is confident that State agencies possess the necessary knowledge, understanding and resources to make decisions about what an appropriate number of exempt fundraisers in schools should be and that the most appropriate approach to specifying the standards for exempt fundraisers is to allow State agencies to set the allowed frequency of such fundraisers. If a State agency does not specify the exemption frequency, no fundraiser exemptions may be granted. It is not USDA's intent that the competitive food standards apply to fundraisers in which the food sold is clearly not for consumption on the school campus during the school day. It is also important to note that LEAs may implement more restrictive competitive food standards, including those related to the frequency with which exempt fundraisers may be held in their schools, and may impose further restrictions on the areas of the schools and the times during which exempt fundraisers may occur in the schools during the school day.

In addition, USDA has provided guidance on fundraisers in response to a variety of specific questions received during implementation and this

guidance may be found in Policy Memo SP 23–2014(V.3) available on our Web site at <http://www.fns.usda.gov/nslp/policy>.

In summary, the exempt fundraiser provisions contained in § 210.11(b)(4) of the IFR are unchanged and the final rule continues to specify that competitive food and beverage items sold during the school day must meet the nutrition standards for competitive food, and that a special exemption is allowed for the sale of food and/or beverages that do not meet the competitive food standards for the purpose of conducting an infrequent school-sponsored fundraiser. Such specially exempted fundraisers must not take place more than the frequency specified by the State agency during such periods that schools are in session. Finally, no specially exempted fundraiser foods or beverages may be sold in competition with school meals in the food service area during the meal service.

#### Availability of Water During the Meal Service

The IFR codified a provision of the HHFKA that requires schools participating in the NSLP to make free, potable water available to children in the place lunches are served during the meal service. Just over 40 comments addressed the part of the IFR that requires schools participating in the NSLP to make free, potable water available to children in the place lunches are served during the meal service and in the cafeteria during breakfast meal service.

Many of these commenters, including advocacy organizations, professional associations and individual commenters, expressed support for the potable water requirement. Two advocacy organizations commented that water has zero calories and is a healthy alternative to sugary drinks. These commenters stated that making the water free and easily accessible may help combat obesity and promote good health. Similarly, one individual commenter stated that the free, potable water requirement will help reduce the purchase of other drinks that are high in added sugars. A few individual commenters remarked that low-income students do not have the luxury of bringing or buying water bottles or even have access to clean running water outside of school, and free potable water is imperative to these students. Two individual commenters recommended that free potable water be available during breakfast, lunch, and all break and recess times regardless of where food is being served.

Section 210.10(a)(1) of the final rule continues to require that schools make potable water available and accessible without restriction to children at no charge in the place where lunches are served during the meal service. In addition, § 220.8(a)(1) requires that when breakfast is served in the cafeteria, schools must make potable water available and accessible without restriction to children at no charge. The Department continues to encourage schools to make potable water available without restriction at all meal and snack services when possible.

#### Recordkeeping

The IFR at § 210.11(b)(2), outlined the recordkeeping requirements associated with competitive foods. Local educational agencies and school food authorities would be required to maintain records documenting compliance with the requirements. Local educational agencies would be responsible for maintaining records documenting compliance with the competitive food nutrition standards for food sold in areas that are outside of the control of the school food service operation. Local educational agencies also would be responsible for ensuring any organization designated as responsible for food service at the various venues in the school (other than the school food service) maintains records documenting compliance with the competitive food nutrition standards. The school food authority would be responsible for maintaining records documenting compliance with the competitive food nutrition standards for foods sold in meal service areas during meal service periods. Required records would include, at a minimum, receipts, nutrition labels and/or product specifications for the items available for sale.

About 120 commenters expressed concerns about recordkeeping, monitoring and compliance. Twenty commenters specifically addressed recordkeeping. Some of those commenters suggested that recordkeeping is costly, unrealistic and/or not necessary. Yet others recommended minimizing the recordkeeping on non-school groups. A number of commenters representing school food service were concerned that the local educational agency would require school food service to be responsible for recordkeeping on behalf of school food service as well as other entities/organizations within the local educational agency. Additionally, they were concerned that school food service could not affect the requirements throughout the local educational agency

since they have no authority over other school organizations.

The Department appreciates that this regulation may have created some new challenges initially, as schools implemented the IFR and took steps to improve the school nutrition environment. Such challenges may be ongoing for some schools. However, maintaining a record that substantiates that the food items available for sale in the schools meet the standards is essential to the integrity of the competitive food standards. To determine whether a food item is an allowable competitive food, the local educational agency designee(s) must assess the nutritional profile of the food item. This may be accomplished by evaluating the product Nutrition Facts Label and/or using the Alliance for a Healthier Generation Calculator to do so and retaining a copy of that evaluation in the files, retaining receipts for the food items ordered or purchased for secondary sale at the various venues at the schools, etc. Absent an evaluation of the nutritional profile of the competitive foods available for sale at the schools, the local educational agency has no way of knowing whether a food item meets the nutrition standards set forth in this rule. The recordkeeping requirement simply requires the local educational agency to retain the reviewed documentation (e.g., the nutrition labels, receipts, and/or product specifications) in their files.

Commenters also expressed concern about the designation of responsibility for this activity. As stated in the IFR, the Department does not expect the responsibility to rest solely with the nonprofit school food service. School food service personnel are expected to have a clear understanding of the nutrition profile of foods purchased using nonprofit school food service funds for reimbursable meals, a la carte offerings, etc. Their authority and responsibilities are typically limited to the nonprofit school food service. Local educational agencies are responsible for ensuring that all entities involved in food sales within a school understand that the local educational agency as a whole must comply with these requirements.

As stated in the IFR, the Department continues to recommend that cooperative duties associated with the sale of competitive foods be coordinated and facilitated by the local school wellness policy designee(s). Section 204 of the HHFKA amended the NSLA by adding section 9A (42 U.S.C. 1758b) which requires each local educational agency to: (a) Establish a local school wellness policy which includes

nutrition standards for all foods available on each school campus, and (b) designate one or more local educational agency officials or school officials, to ensure that each school complies with the local school wellness policy. State agencies were advised of the section 204 requirements in FNS Memorandum, *Child Nutrition Reauthorization 2010: Local School Wellness Policies*, issued July 8, 2011 (SP 42–2011). In addition, the Department published a proposed rule titled *Local School Wellness Policy Implementation Under the Healthy, Hunger Free Kids Act of 2010* on February 26, 2014 at 79 FR 10693. Comments were submitted by the public and those comments are being analyzed for the development of an upcoming final rule.

The Department believes, and the experience of many operators confirms, that if the LEA local school wellness designee(s), school food service, and other entities and groups involved with the sale of food on the school campus during the school day work together to share information on allowable foods and coordinate recordkeeping responsibilities, the result is the successful implementation and maintenance of a healthy school environment. As always, State agencies and the Department will provide technical assistance to facilitate ongoing implementation of the competitive food nutrition standards.

Therefore, there are no changes to the recordkeeping requirements and § 210.11(b)(2) of the IFR is affirmed.

#### Compliance and Monitoring

Section 210.18(h)(6) requires State agencies to ensure that local educational agencies comply with the nutrition standards for competitive food and retain documentation demonstrating compliance with the competitive food service and standards.

As indicated above, about 120 commenters submitted comments related to recordkeeping, monitoring and compliance. A number of commenters, largely school food service personnel, expressed concerns about how monitoring would occur for foods sold by groups outside of the school food service. Some commenters believed technical assistance would be insufficient and raised questions about means to effect compliance. Other commenters expressed concerns about the need to train and educate non-school food service personnel as to how to comply with the regulations. Several State agencies, school districts and individuals requested that the SFA not

be held accountable for compliance issues outside of the control of the SFA.

The Department agrees that training will be needed to ensure compliance with the nutrition standards. As mentioned under the discussion of *Recordkeeping* above, the Department envisions local educational agency designees, potentially the local school wellness coordinator(s), taking the lead in developing performance or compliance standards and training for all local educational personnel tasked with selling competitive food on the school campus during the school day. The Department and State agencies will also offer training to ensure local educational agencies are able to comply in the most efficient manner possible.

The Department published a proposed rule titled *Administrative Reviews in the School Nutrition Programs* on May 11, 2015 (80 FR 26846) addressing an updated administrative review process that includes these new monitoring responsibilities. This rule, together with administrative review guidance, provides information regarding the proposed conduct and scope of reviews, and the monitoring and records review that will be conducted with regard to competitive foods. Currently, USDA is reviewing the comments received from the public on the proposed rule in preparation for the development of an implementing rule.

The Department would like to assure commenters that we see technical assistance and training as the first approach to non-compliance; however, we recognize that egregious, repeated cases of non-compliance may require a more aggressive approach. In this regard, section 303 of the HHFKA amended section 22 of the NSLA (42 U.S.C. 1769c) to provide the Department with the authority to impose fines against any school or school food authority repeatedly failing to comply with program regulations. This authority will be addressed in a proposed rule dealing with a number of integrity issues related to local educational agencies administering the Child Nutrition Programs which is currently under development. Interested parties will have an opportunity to comment on the proposed integrity rule.

#### Special Situations/Applicability

This rule continues to require that all local educational agencies and schools participating in the NSLP and SBP meet the nutrition standards for competitive foods sold to students on the school campus during the school day. Several questions have been received regarding the applicability of these standards to after school programs operated in

schools that participate in NSLP/Child and Adult Care Food Program (CACFP). The Department wishes to clarify that such programs are required to comply with their specified meal patterns. Only if food is *sold* to their program participants outside of their meal pattern would the competitive foods standards be applicable for 30 minutes after the end of the official school day, consistent with the definition of *School day* specified in § 210.11(a)(5).

Forty comments addressed impacts of the IFR on culinary training programs. These commenters urged for complete exemption from the competitive food standards for foods prepared and sold as part of culinary education programs. In contrast, a school district, school food service staff, and other individual commenters urged USDA to apply the competitive food standards to foods sold to students during the school day by culinary arts programs.

The Department addressed the applicability of the competitive foods regulation on culinary arts programs in Policy Memo SP 40–2014, published on April 22, 2014. That memo recognized that culinary education programs providing students with technical career training operate in some schools nationwide. Some of those culinary education programs operate food service outlets that sell foods to students, faculty, or others in the community, with a minority of programs doing so during the school day. The memo also clarified that the competitive foods nutrition standards have no impact on the culinary education programs' curriculum in schools, nor do they have any impact on foods sold to adults at any time or to students outside of the school day. However, to the extent that such programs are selling food to students on campus during the school day, the statutory applicability of the Smart Snacks nutrition standards to all foods sold outside of the School meals programs is clear. Section 12(l)(4)(j) of the NSLA (42 U.S.C. 1760(l)(4)(j)), prohibits the Secretary from granting a waiver that relates to the requirements of the NSLA, the CNA, or any regulation issued under either statute with regard to the sale of foods sold outside of the school meal programs. The nutrition standards included in the final rule continue to apply to all foods sold to students on the school campus during the school day, including food prepared and/or sold by culinary education programs.

## Related Information

### Implementation

The competitive food provisions contained in the IFR were implemented by State agencies and local educational agencies on July 1, 2014. Changes made in this final rule may be implemented as specified in the **DATES** section of this preamble. While the total fat standard remains in place, additional comments on the interim final total fat standard are being accepted and must be received as specified in the **DATES** section of this preamble. The saturated fat and trans fat standards are finalized in this rule. This final rule removes § 210.11a and its corresponding Appendix B, which references the sale of foods of minimal nutritional value, since those standards were eliminated as of July 1, 2014, the date that competitive food standards were implemented in their place. Similar changes are made to the breakfast program regulations at 7 CFR part 220.

### Procedural Matters

#### *Executive Order 12866 and Executive Order 13563*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This Final rule has been designated an “economically significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

#### *Regulatory Flexibility Analysis*

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). The rule directly regulates the 54 State education agencies and 3 State Departments of Agriculture that operate the NSLP pursuant to agreements with USDA's Food and Nutrition Service. While State agencies are not considered small entities as State populations exceed the 50,000 threshold for a small government jurisdiction, many of the service-providing institutions that work with them to implement the program do meet definitions of small entities.

The requirements established by this final rule will apply to school districts, which meet the definitions of “small governmental jurisdiction” and other establishments that meet the definition of “small entity” in the Regulatory Flexibility Act. The Regulatory Flexibility Act analysis is published as part of the docket (FNS–2011–0019) on [www.regulations.gov](http://www.regulations.gov).

#### *Regulatory Impact Analysis Summary*

As required for all rules that have been designated as significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this final rule. A summary is presented below. The full RIA is published as part of the docket (FNS–2011–0019) on [www.regulations.gov](http://www.regulations.gov).

#### *Need for Action*

The final rule responds to two provisions of the Healthy, Hunger-Free Kids Act of 2010. Section 208 of HHFKA amended Section 10 of the Child Nutrition Act of 1966 to require the Secretary to establish science-based nutrition standards for all foods sold in schools during the school day. In addition, the amendments made by section 203 of the HHFKA amended section 9(a) of the NSLA (42 U.S.C. 1758(a)) to require that schools participating in the NSLP make potable water available to children at no charge in the place where meals are served during the meal service. This is a nondiscretionary requirement of the HHFKA that became effective October 1, 2010, and was required to be implemented by August 27, 2013.

#### *Response to Comments*

The full Regulatory Impact Analysis includes a brief discussion of comments submitted by school officials, public health organizations, industry representatives, parents, students, and other interested parties on the costs and benefits of the final rule submitted. The analysis also contains a discussion of how USDA modified the final rule in response, and the effect of those modifications on the costs and benefits of the rule.

#### *Benefits*

The primary purpose of the rule is to ensure that nutrition standards for competitive foods are consistent with those used for the NSLP and SBP, holding competitive foods to standards similar to the rest of foods available to students during the school day. These standards, combined with recent improvements in school meals, will help promote diets that contribute to students' long-term health and well-

being. In addition, these standards continue to support a healthy school environment and the efforts of parents to promote healthy choices for children at home and at school.

Obesity has become a major public health concern in the U.S., with one-third of U.S. children and adolescents now considered overweight or obese (Beydoun and Wang 2011<sup>2</sup>), with current childhood obesity rates four times higher in children ages six to 11 than they were in the early 1960s (19 vs. 4 percent), and three times higher (17 vs. 5 percent) for adolescents ages 12 to 19.<sup>3</sup> Research focused specifically on the effects of obesity in children indicates that obese children feel they are less capable, both socially and athletically, less attractive, and less worthwhile than their non-obese counterparts.<sup>4</sup> Further, there are direct economic costs due to childhood obesity: \$237.6 million (in 2005 dollars) in inpatient costs<sup>5</sup> and annual prescription drug, emergency room, and outpatient costs of \$14.1 billion.<sup>6</sup>

Because the factors that contribute both to overall food consumption and to obesity are so complex, it is not possible to define a level of disease or cost reduction expected to result from implementation of the rule. There is some evidence, however, that competitive food standards can improve children's dietary quality.

<sup>2</sup> Beydoun, M.A. and Y. Wang, 2011. Socio-demographic disparities in distribution shifts over time in various adiposity measures among American children and adolescents: What changes in prevalence rates could not reveal. *International Journal of Pediatric Obesity*, 6:21–35. As cited in Food Labeling: Calorie Labeling of Articles of Food in Vending Machines NPRM. 2011. Preliminary Regulatory Impact Analysis, Docket No. FDA–2011–F–0171.

<sup>3</sup> Ogden et al. *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963–1965 Through 2007–2008*. CDC–NHCS, NCHS Health E-Stat, June 2010. On the web at [http://www.cdc.gov/nchs/data/hestat/obesity\\_child\\_07\\_08/obesity\\_child\\_07\\_08.htm](http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.htm).

<sup>4</sup> Riazzi, A., S. Shakoob, I. Dundas, C. Eiser, and S.A. McKenzie. 2010. Health-related quality of life in a clinical sample of obese children and adolescents. *Health and Quality of Life Outcomes*, 8:134–139. Samuels & Associates. 2006. *Competitive Foods*. Policy Brief prepared by Samuels & Associates for The California Endowment and Robert Wood Johnson Foundation. Available at: <http://www.healthyeatingactivecommunities.org/downloads/>

<sup>5</sup> Trasande, L., Y. Liu, G. Fryer, and M. Weitzman. 2009. Trends: Effects of Childhood Obesity on Hospital Care and Costs, 1999–2005. *Health Affairs*, 28:w751–w760.

<sup>6</sup> Cawley, J. 2010. The Economics of Childhood Obesity. *Health Affairs*, 29:364–371. As cited in Food Labeling: Calorie Labeling of Articles of Food in Vending Machines NPRM. 2011. Preliminary Regulatory Impact Analysis, Docket No. FDA–2011–F–0171.

• Taber, Chriqui, and Chaloupka (2012<sup>7</sup>) concluded that California high school students consumed fewer calories, less fat, and less sugar at school than students in other States. Their analysis “suggested that California students did not compensate for consuming less within school by consuming more elsewhere” (p. 455).

• In an assessment of the reach and effectiveness of childhood obesity strategies, Gortmaker et al.<sup>8</sup> project that implementing nutrition standards for all foods and beverages sold in schools outside of reimbursable school meals will prevent an estimated 345,000 cases of childhood obesity in 2025 (p. 1937).

• Schwartz, Novak, and Fiore, (2009<sup>9</sup>) determined that healthier competitive food standards decreased student consumption of low nutrition items with no compensating increase at home.

• Researchers at Healthy Eating Research and Bridging the Gap found that “[t]he best evidence available indicates that policies on snack foods and beverages sold in school impact children's diets and their risk for obesity. Strong policies that prohibit or restrict the sale of unhealthy competitive foods and drinks in schools are associated with lower proportions of overweight or obese students, or lower rates of increase in student BMI” (Healthy Eating Research and Bridging the Gap, 2012, p. 3<sup>10</sup>).

A comprehensive assessment of the evidence on the importance of competitive food standards conducted by the Pew Health Group concluded that a national competitive foods policy would increase student exposure to healthier foods, decrease exposure to less healthy foods, and would also likely improve the mix of foods that students purchase and consume at school. Researchers concluded that these kinds of changes in food exposure and consumption at school are important influences on the overall quality of children's diets.

<sup>7</sup> Taber, D.R., J.F. Chriqui, and F. J. Chaloupka. 2012. Differences in Nutrient Intake Associated With State Laws Regarding Fat, Sugar, and Caloric Content of Competitive Foods. *Archives of Pediatric & Adolescent Medicine*, 166:452–458.

<sup>8</sup> Gortmaker SL, Claire Wang Y, Long MW, Giles CM, Ward ZJ, Barrett JL, Kenney EL, Sonnevile KR, Afzal AS, Resch SC, Cradock AL., *Health Affairs*, 34, no. 11 (2015).

<sup>9</sup> Schwartz, M.B., S.A. Novak, and S.S. Fiore. 2009. The Impact of Removing Snacks of Low Nutritional Value from Middle Schools. *Health Education & Behavior*, 36:999–1011.

<sup>10</sup> Healthy Eating Research and Bridging the Gap. 2012. Influence of Competitive Food and Beverage Policies on Children's Diets and Childhood Obesity. Available at [http://www.healthyeatingresearch.org/images/stories/her\\_research\\_briefs/Competitive\\_Foods\\_Issue\\_Brief\\_HER\\_BTG\\_7-2012.pdf](http://www.healthyeatingresearch.org/images/stories/her_research_briefs/Competitive_Foods_Issue_Brief_HER_BTG_7-2012.pdf)

Although nutrition standards for foods sold at school alone may not be a determining factor in children's overall diets, they are critical to providing children with healthy food options throughout the entire school day. Thus, these standards will help to ensure that the school nutrition environment does all that it can to promote healthy choices, and help to prevent diet-related health problems. Ancillary benefits could derive from the fact that improving the nutritional value of competitive foods may reinforce school-based nutrition education and promotion efforts and contribute significantly to the overall effectiveness of the school nutrition environment in promoting healthful food and physical activity choices.<sup>11</sup>

### Costs

While there have been numerous success stories, best practices, and innovative practices, it is too early to definitively ascertain the overall impact to school revenue. The changes and technical clarifications in the final rule do not change the methodology of the cost benefit analysis from the methodology used in the interim final regulatory impact analysis, however the estimates are updated using the most recent data available to assess the impacts to revenue and to account for the potential variation in implementation and sustainability experiences across SFAs and schools.

The limited information available indicates that many schools have successfully introduced competitive food reforms with little or no loss of revenue and in a few cases, revenues from competitive foods increased after introducing healthier foods. In some of the schools that showed declines in competitive food revenues, losses from reduced sales were fully offset by increases in reimbursable meal revenue. In other schools, students responded favorably to the healthier options and competitive food revenue declined little or not at all.

But not all schools that adopted or piloted competitive food standards fared as well. Some of the same studies and reports that highlight school success stories note that other schools sustained some loss after implementing similar standards. While in some cases these were short-term losses, even in the long-

<sup>11</sup> Pew Health Group and Robert Wood Johnson Foundation. 2012. *Health Impact Assessment: National Nutrition Standards for Snack and a la Carte Foods and Beverages Sold in Schools*. Available online: [http://www.pewhealth.org/uploadedFiles/PHG/Content\\_Level\\_Pages/Reports/KS%20HIA\\_FULL%20Report%20062212\\_WEB%20FINAL-v2.pdf](http://www.pewhealth.org/uploadedFiles/PHG/Content_Level_Pages/Reports/KS%20HIA_FULL%20Report%20062212_WEB%20FINAL-v2.pdf).

term the competitive food revenue lost by those schools was not offset (at least not fully) by revenue gains from the reimbursable meal programs.

Our analysis examines the possible effects of the rule on school revenues from competitive foods and the administrative costs of complying with the rule's competitive foods provisions. The analysis uses available data to construct model-based scenarios that different schools may experience in implementing the rule. While these vary in their impact on overall school food revenue, each scenario's estimated impact is relatively small (+0.5 percent to -1.3 percent). That said, the data behind the scenarios are insufficient to assess the frequency or probability of schools experiencing the impacts shown in each.

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. Because data is not available to meaningfully estimate the quantitative impacts of this rule on school food authority revenues, we are not certain that this rule is subject to the requirements of sections 202 and 205 of the UMRA. That said, it is possible that the rule's requirements could impose costs on State, local, or Tribal governments or to the private sector of \$100 million or more in any one year. FNS therefore conducted a regulatory impact analysis that includes a cost/benefit analysis substantially meeting the requirements of sections 202 and 205 of the UMRA.

#### *Executive Order 12372*

The NSLP is listed in the Catalog of Federal Domestic Assistance under No. 10.555. The SBP is listed in the Catalog of Federal Domestic Assistance under No. 10.553. For the reasons set forth in the final rule in 7 CFR part 3015,

subpart V and related notice (48 FR 29115, June 24, 1983), these programs are included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

#### *Executive Order 13132*

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132. USDA has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. This rule does not impose substantial or direct compliance costs on State and local governments. Therefore, under Section 6(b) of the Executive Order, a federalism summary impact statement is not required.

#### *Executive Order 12988*

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full implementation. This rule is not intended to have retroactive effect unless specified in the **DATES** section of the final rule. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

#### *Civil Rights Impact Analysis*

FNS has reviewed this rule in accordance with Departmental Regulations 4300-4, "Civil Rights Impact Analysis," and 1512-1, "Regulatory Decision Making Requirements." After a careful review of the rule's intent and provisions, FNS has determined that this rule is not intended to limit or reduce in any way the ability of protected classes of individuals to receive benefits on the basis of their race, color, national origin, sex, age or disability nor is it intended to have a differential impact on minority owned or operated business establishments and woman-owned or operated business establishments that participate in the Child Nutrition Programs.

#### *Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this final rule does not contain substantive changes to information collection requirements that require additional approval by OMB. The paperwork requirements for this final rule were previously approved by the Office of Management and Budget (OMB) for the interim final rule under OMB control #0584-0576 and merged into #0584-0006.

#### *E-Government Act Compliance*

The Food and Nutrition Service is committed to complying with the E-Government Act of 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services and for other purposes.

#### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the federal government and Indian Tribes. In the spring of 2011, FNS offered opportunities for consultation with Tribal officials or their designees to discuss the impact of the Healthy, Hunger-Free Kids Act of 2010 on tribes or Indian Tribal governments. The consultation sessions were coordinated by FNS and held on the following dates and locations:

1. HHFKA Webinar & Conference Call—April 12, 2011
2. Mountain Plains—HHFKA Consultation, Rapid City, SD—March 23, 2011
3. HHFKA Webinar & Conference Call—June, 22, 2011
4. Tribal Self-Governance Annual Conference in Palm Springs, CA—May 2, 2011
5. National Congress of American Indians Mid-Year Conference, Milwaukee, WI—June 14, 2011

The five consultation sessions in total provided the opportunity to address Tribal concerns related to school meals. There were no comments about this regulation during any of the

mentioned Tribal consultation sessions.

Currently, FNS provides regularly scheduled quarterly consultation sessions as a venue for collaborative conversations with Tribal officials or their designees. The most recent specific discussion of the Nutrition Standards for All Foods Sold in Schools rule was included in the consultation conducted on August 19, 2015. No questions or comments were raised specific to this rulemaking at that time.

Reports from these consultations are part of the USDA annual reporting on Tribal consultation and collaboration. FNS will respond in a timely and meaningful manner to Tribal government requests for consultation concerning this rule.

#### List of Subjects

##### 7 CFR Part 210

Grant programs-education; Grant programs-health; Infants and children; Nutrition; Reporting and recordkeeping requirements; School breakfast and lunch programs; Surplus agricultural commodities.

##### 7 CFR Part 220

Grant programs-education; Grant programs-health; Infants and children; Nutrition; Reporting and recordkeeping requirements; School breakfast and lunch programs.

Accordingly, for the reasons set forth in the preamble, 7 CFR parts 210 and 220 are amended as follows:

#### PART 210—NATIONAL SCHOOL LUNCH PROGRAM

- 1. The authority citation for 7 CFR part 210 continues to read as follows:

**Authority:** 42 U.S.C. 1751–1760, 1779.

- 2. In § 210.11:
  - a. Revise paragraph (a)(3);
  - b. Add paragraph (a)(6);
  - c. Remove paragraph (c)(2)(v);
  - d. Paragraph (c)(2)(vi) is redesignated as (c)(2)(v);
  - e. Revise paragraph (d);
  - f. Add paragraph (f)(3)(iv);
  - g. Revise the heading and the first sentence of paragraph (i); and
  - h. Revise paragraph (j);

The revisions and additions read as follows:

##### § 210.11 Competitive food service and standards.

(a) \* \* \*

(3) *Entrée item* means an item that is intended as the main dish and is either:

(i) A combination food of meat or meat alternate and whole grain rich food; or

(ii) A combination food of vegetable or fruit and meat or meat alternate; or  
(iii) A meat or meat alternate alone with the exception of yogurt, low-fat or reduced fat cheese, nuts, seeds and nut or seed butters, and meat snacks (such as dried beef jerky); or

(iv) A grain only, whole-grain rich entrée that is served as the main dish of the School Breakfast Program reimbursable meal.

\* \* \* \* \*

(6) *Paired exempt foods* mean food items that have been designated as exempt from one or more of the nutrient requirements individually which are packaged together without any additional ingredients. Such “paired exempt foods” retain their individually designated exemption for total fat, saturated fat, and/or sugar when packaged together and sold but are required to meet the designated calorie and sodium standards specified in §§ 210.11(i) and (j) at all times.

\* \* \* \* \*

(d) *Fruits and vegetables.* (1) Fresh, frozen and canned fruits with no added ingredients except water or packed in 100 percent fruit juice or light syrup or extra light syrup are exempt from the nutrient standards included in this section.

(2) Fresh and frozen vegetables with no added ingredients except water and canned vegetables that are low sodium or no salt added that contain no added fat are exempt from the nutrient standards included in this section.

\* \* \* \* \*

(f) \* \* \*

(3) \* \* \*

(iv) Whole eggs with no added fat are exempt from the total fat and saturated fat standards but are subject to the trans fat, calorie and sodium standards.

\* \* \* \* \*

(i) *Calorie and sodium content for snack items and side dishes sold as competitive foods.* Snack items and side dishes sold as competitive foods must have not more than 200 calories and 200 mg of sodium per item as packaged or served, including the calories and sodium contained in any added accompaniments such as butter, cream cheese, salad dressing, etc., and must meet all of the other nutrient standards in this section. \* \* \*

(j) *Calorie and sodium content for entrée items sold as competitive foods.* Entrée items sold as competitive foods, other than those exempt from the competitive food nutrition standards in paragraph (c)(3)(i) of this section, must have not more than 350 calories and 480 mg of sodium per item as packaged or served, including the calories and

sodium contained in any added accompaniments such as butter, cream cheese, salad dressing, etc., and must meet all of the other nutrient standards in this section.

\* \* \* \* \*

##### § 210.11a [Removed]

- 3. Section 210.11a is removed.

##### Appendix B to Part 210 [Removed]

- 4. Appendix B to part 210 is removed.

#### PART 220—SCHOOL BREAKFAST PROGRAM

- 5. The authority citation for 7 CFR part 220 continues to read as follows:

**Authority:** 42 U.S.C. 1773, 1779, unless otherwise noted.

##### § 220.12a [Removed]

- 6. Remove § 220.12a.

##### Appendix B to Part 220 [Removed and Reserved]

- 7. Remove and reserve Appendix B to part 220.

Dated: June 21, 2016.

**Kevin W. Concannon,**  
*Under Secretary, Food, Nutrition, and Consumer Services.*

[FR Doc. 2016–17227 Filed 7–28–16; 8:45 am]

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#### DEPARTMENT OF AGRICULTURE

##### Food and Nutrition Service

##### 7 CFR Parts 210 and 220

[FNS–2014–0010]

RIN 0584–AE25

##### Local School Wellness Policy Implementation Under the Healthy, Hunger-Free Kids Act of 2010

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule requires all local educational agencies that participate in the National School Lunch and School Breakfast Programs to meet expanded local school wellness policy requirements consistent with the requirements set forth in section 204 of the Healthy, Hunger-Free Kids Act of 2010. The final rule requires each local educational agency to establish minimum content requirements for the local school wellness policies, ensure stakeholder participation in the development and updates of such policies, and periodically assess and disclose to the public schools’